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No.....

Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

VS.

RUSSELL RICHARD DODSON,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit erred in holding that a county employed public defender acts under color of state law in representing indigent defendants, and is subject to suit under 42 U.S.C. §1983.

2. Whether the Court of Appeals for the Eighth Circuit erred in holding that in suits brought under 42 U.S.C. §1983, a county employed public defender enjoys only a qualified immunity for actions taken while representing indigent clients.

TABLE OF CONTENTS

Table of Authorities . . . . . iv

Opinions Below . . . . . 2

Jurisdiction . . . . . 2

Questions Presented . . . . . 3

Statute Involved . . . . . 3

Statement of the Case . . . . . 4

Reasons for Granting the Writ:

I. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER REPRESENTING AN INDIGENT DEFENDANT OPERATES UNDER COLOR OF STATE LAW FOR PURPOSES OF 42 U.S.C. §1983 IS A QUESTION WHICH HAS CREATED A CONSIDERABLE SPLIT IN AUTHORITY AMONG FEDERAL COURTS ENTERTAINING THE ISSUE, AND RAISES SIGNIFICANT AND RECURRING PROBLEMS UNDER THE ACT . . . . . 7

II. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER ENJOYS A DEGREE OF IMMUNITY FROM LIABILITY UNDER 42 U.S.C. §1983 IS AN ISSUE WHICH HAS CREATED A SPLIT IN AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL WHICH HAVE DECIDED THE QUESTION, AND RAISES IMPORTANT AND RECURRING PROBLEMS UNDER THE STATUTE . . . 13

Conclusion . . . . . 19

APPENDIX "A":

DECISION BELOW BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED AUGUST 26, 1980 . . . A1

APPENDIX "B":

DECISION ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, FILED NOVEMBER 5, 1979 . . . . . B1

## TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) . . . . . | 9,10,14,15,16 |
| Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) . . . | 9,10 |
| Ferri v. Ackerman, ___U.S.___, 48 U.S.L.W. 4054 (1979) . . | 17,18 |
| John v. Hurt, 489 F.2d 786 (7th Cir. 1973) . . . . . | 15 |
| Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) . . . . | 9,14 |
| Minns v. Paul, 542 F.2d 899 (4th Cir. 1976) . . . . . | 14,15,16 |
| Peake v. County of Philadelphia, Pennsylvania, 280 F.Supp. 853 (E.D. Pa. 1968) . . . . . | 10 |
| Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) . . . . | 8,14 |
| Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) . . . . . | 9 |
| United States ex rel. Wood v. Blacker, 335 F.Supp. 43 (D.C. N.J. 1971) . . . . . | 10 |
| Statutes: | |
| 42 U.S.C. §1983 . . . . . | passim |
| 28 U.S.C. §1343(3) . . . . . | 5 |
| Iowa Rule of Appellate Procedure 104 | 5 |

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

vs.

RUSSELL RICHARD DODSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-named Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered in this case on August 26, 1980.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, was filed on August 26, 1980, and is reproduced in Appendix "A" hereof. The opinion of the United States District Court for the Southern District of Iowa was filed on November 5, 1979, is reported at 483 F. Supp. 347, and is reproduced in Appendix "B" hereof.

## JURISDICTION

The Judgment and Opinion of the panel of the Court of Appeals for the Eighth Circuit was entered on August 26, 1980,[1] and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1343(3).

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[1] Judge Overton of the United States District Court for the Eastern District of Arkansas, sitting by designation, dissented from the Court's Opinion.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit erred in holding that a county employed public defender acts under color of state law in representing indigent defendants, and thus is subject to suit under 42 U.S.C. §1983.

2. Whether the Court of Appeals for the Eighth Circuit erred in holding that in suits brought under 42 U.S.C. §1983, a county employed public defender enjoys only a qualified immunity for actions taken while representing indigent clients.

## STATUTE INVOLVED

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE

This case presents two related questions of fundamental and recurring importance concerning the liability of government employed public defenders under 42 U.S.C. §1983: First, whether a public defender, in representing indigent defendants, acts under color of state law; and second, whether the public defender enjoys immunity, either qualified or absolute, for conduct during that representation.

This action began when the Respondent filed a pro se complaint in the United States District Court for the Southern District of Iowa alleging that Martha Shepard, an attorney in the Polk County Offender Advocate's Office, failed to adequately represent him in his appeal to the Iowa Supreme Court of a robbery conviction. The Respondent contended that Mrs. Shepard had been appointed to represent him on his appeal of his conviction,

but had moved for permission to withdraw as counsel and had the appeal dismissed as frivolous. Iowa Rule of Appellate Procedure 104 provides for dismissal of appeals found by the Iowa Supreme Court to be "wholly frivolous". The Motion to Withdraw was granted by the Iowa Supreme Court and the appeal was dismissed.

The Respondent then instigated the present lawsuit in the United States District Court for the Southern District of Iowa, claiming that Mrs. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause. The action was brought under 42 U.S.C. §1983, and jurisdiction was invoked pursuant to 28 U.S.C. §1343(3). The complaint also named the Polk County Offender Advocate and the Polk County Board of Supervisors as Defendants, alleging that they

were responsible for Mrs. Shepard's actions because they had established rules and procedures for her to follow. The complaint sought both injunctive relief and monetary damages.

The District Court[2] dismissed the claims against Mrs. Shepard and the Offender Advocate for lack of state action. The claims against the Polk County Board of Supervisors were also dismissed because, in the District Court's opinion, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. The Respondent then filed a Motion to Reconsider, or in the alternative, a Motion for Leave to Take an Interlocutory Appeal. The Court overruled the Motion to Reconsider, and ordered that the Respondent could proceed in forma pauperis to appeal the Court's order of dismissal.

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[2] The United States District Court for the Southern District of Iowa, the Honorable Harold D. Vietor presiding.

On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. John D. Hudson was appointed to represent the Respondent to address the sole issue of whether or not a public defender is subject to suit under 42 U.S.C. §1983. Briefs were filed, oral argument was presented, and on August 26, 1980, the Eighth Circuit, after recognizing the considerable split in authority among the Federal Courts entertaining this issue, reversed the decision of the District Court and held that a county employed public defender does act under color of state law in representing indigent defendants and enjoys only a qualified immunity from liability.

## REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER REPRESENTING AN INDIGENT DEFENDANT OPERATES UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. §1983 IS A QUESTION WHICH

HAS CREATED A CONSIDERABLE SPLIT IN AUTHORITY AMONG FEDERAL COURTS ENTERTAINING THE ISSUE, AND RAISES SIGNIFICANT AND RECURRING PROBLEMS UNDER THE ACT.

Relief under 42 U.S.C. §1983 is available only if the party alleged to be liable operated "under color of state law". This requirement appears to be an essential jurisdictional ingredient of a §1983 action. At the present time, five other United States Courts of Appeal have been faced with the question of whether or not a public defender representing an indigent defendant acts under color of state law so as to be in the purview of 42 U.S.C. §1983. The Seventh Circuit has issued a decision consistent with the Eighth Circuit's ruling in t is case. Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). However, the Third, Fifth, Ninth and Tenth Circuits have rendered decisions which are diametrically

opposed to the view expressed by the Eighth Circuit and the Seventh Circuit. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) (dictum); Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); and Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). Those four Circuit Courts of Appeal all ruled that a public defender's actions were not performed under color of state law so as to render the defender liable in a §1983 action.

In Espinoza, supra, the Tenth Ciruit reasoned as follows:

> "It is well settled that in order for a defendant to be liable under the Civil Rights Act he must have acted under color of state law to cause the denial of a federally protected right . . . The Colorado office of public defender derives its existence from Colorado statutes . . . These statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally,

> a Colorado public defender's responsibilities toward his clients are identical in all respects to any other Colorado attorney whether privately obtained or court appointed."
>
> "Therefore, we hold that an attorney does not act under color of state law simply because he has accepted employment as a Colorado public defender."

The Espinoza Court was pursuaded by the analysis of the District Courts in United States ex rel. Wood v. Blacker, 335 F. Supp. 43 (D.C. N.J. 1971), and Peake v. County of Philadelphia, Pennsylvania, 280 F. Supp. 853 (E.D. Pa. 1968).

In contrast with the Tenth Circuit's reasoning in Espinoza, and the Third Circuit's opinion in Brown, the lower court's decision rested upon the fact that all of the public defenders of Polk County are hired and payed by the County and are not selected by their clients. In finding color of state law on the part of Polk County's public defenders, the Eighth Circuit stated:

> "In our view, however, the dispositive point is that the Offender Advocate and all his subordinates are employees of the County, which in turn, of course, is merely a creature of the State of Iowa. All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point . . ."

This confused and conflicting state of the law in the various Circuit Courts of Appeal presents significant problems for the state and municipal governmental bodies who provide funding for these public defender offices. Currently, with the relevant jurisdictional question essentially undecided, state and local officials are unable to determine whether or not they need to purchase insurance policies which will provide liability coverage for potential §1983 claims that may be filed against their public defenders. In addition, these same officials need to know whether the defense

of §1983 suits is going to place a drain upon that legal services resource known as the public defender; very simply, if the public defender is going to be required to answer in court every time a §1983 action is filed against him, his attention and energy will be diverted and will result in governing bodies being compelled to hire additional public defenders to so compensate. Finally, local judges are interested in this issue, since the current status of the law causes them confusion in deciding whether to appoint as counsel for indigents private attorneys, who are not liable under §1983, or public defenders, who may be subject to suit under the statute.

The divergent conclusions which have been reached in the Circuit Courts of Appeal on this issue, and the resulting problems to state and local officials, are perhaps the best evidence that this issue is one which must be resolved by the United States Supreme Court. The Supreme Court's guidance

is greatly needed to answer the significant question of whether or not a public defender representing an indigent defendant operates under color of state law, a jurisdictional requirement for an action under 42 U.S.C. §1983. Governments may well consider the final answer to this question in determing the manner in which to fulfill their duty to provide indigents with criminal defense counsel.

II. THE QUESTION OF WHETHER OR NOT A COUNTY EMPLOYED PUBLIC DEFENDER REPRESENTING AN INDIGENT DEFENDANT ENJOYS A DEGREE OF IMMUNITY FROM LIABILITY UNDER 42 U.S.C. §1983 HAS CREATED A SPLIT IN AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL WHICH HAVE DECIDED THE QUESTION, AND RAISES IMPORTANT AND RECURRING PROBLEMS UNDER THE STATUTE.

A secondary question which the Circuit Courts of Appeal have been faced with in deciding §1983 claims against public defenders

is the degree of immunity, if any, that public defenders enjoy from actions brought under 42 U.S.C. §1983. This issue becomes of paramount importance if a court concludes that a public defender does act under color of state law for the purposes of §1983, because a grant of immunity may absolve the defender from potential liability. Every Court of Appeals that has decided the issue has held that public defenders enjoy some form of immunity from suits brought under 42 U.S.C. §1983.

The Third, Fourth, Seventh and Ninth Circuits hold that a public defender should be accorded absolute immunity from actions under 42 U.S.C. §1983 for acts performed as legal counsel to indigent defendants. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); and Miller v. Barilla, 549 F.2d

648 (9th Cir. 1977). However, with its ruling below granting public defenders only a qualified immunity from §1983 liability, the Eighth Circuit's decision is significantly in opposition to the views expressed by the other Circuits.

In Minns, supra, the Fourth Circuit, in granting absolute immunity to a public defender sued under §1983, reasoned as follows:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state appointed and state subsidized defenders . . ."
>
> "The decisions of the Third Circuit in Brown and that of the Seventh Circuit in John correctly identify the policy reasons which support the rule of absolute immunity. Basically, there are two: (a) The need to recuirt and hold able lawyers to represent indigents - both full time and part time public defenders, as well as private practitioners appointed by courts to represent individual defendants or litigants, and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light of their training and

> experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced."

The Minns Court went on to recognize that unless absolute immunity was granted, public defenders would not be totally free to exercise their best judgment in representing clients since every decision would be weighed in terms of potential liability. Further, the Fourth Circuit was pursuaded by the analysis of the Third Circuit in Brown when it noted that a rule of absolute immunity for public defenders would not leave the typical indigent defendant entirely remediless. The Court stated that if the misconduct of the defender results in the deprivation of a federal right in the defense of a prosecution, redress of such deprivation may be achieved through a direct appeal, a state post-conviction remedy, or by federal habeas corpus proceedings.

In contrast with the Fourth Circuit's reasoning in Minns, and with the various decisions of the Third, Seventh and Ninth Circuit Courts of Appeal, the Eighth Circuit's ruling below granted public defenders only a qualified immunity from §1983 claims for actions taken while representing indigent clients. After citing Ferri v. Ackerman, ____U.S.____, 48 U.S.L.W. 4054 (1979), which held that in the context of a malpractice action arising under state law, an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law, the Eighth Circuit concluded:

> "Although Ferri was not a civil rights action, its rationale is controlling here by analogy. We perceive no distinction of substance, for immunity purposes, between appointed counsel and a public defender. If federal law does not immunize counsel appointed by a federal court from a state law tort action, neither does it immunize a public defender from liability under 42 U.S.C. §1983 for a constitutional tort. . . ."

"On the other hand, we do not read Ferri to prohibit the implication of some degree of immunity in §1983 cases . . ."

". . . Lawyers representing indigent clients should feel free to exercise in good faith their professional judgment to decline to press the frivolous claim and to make decisions regarding strategy and tactics . . . In addition, the law should not make it too difficult to recruit and hold vigorous and competent attorneys to represent indigent defendants. The grant of a qualified immunity is an appropriate compromise between these interests on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights are violated. We hold, therefore, that in §1983 suits attorneys employed by public defender offices enjoy the qualified immunity we have described for actions taken while representing indigent clients."

The obvious conflicts in the decisions of the Circuit Courts of Appeal indicate that this issue should be resolved by the United States Supreme Court. A binding ruling by the Supreme Court is required not only to protect the interests of county employed public defenders, but also to define

and illuminate the constitutional remedies available to indigent defendants under 42 U.S.C. §1983.

## CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eighth Circuit Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
St. Louis, Missouri
Heard June 9, 1980
Filed August 26, 1980
Before

Hon. GERALD W. HEANEY, Circuit Judge
Hon. RICHARD S. ARNOLD, Circuit Judge
Hon. WILLIAM A. OVERTON, District Judge*

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NO._____

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RUSSELL RICHARD DODSON,

Appellant,

v.

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE: and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Appellees.

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Appeal from the United States District Court for the Southern District of Iowa, Central Division, Des Moines, Iowa
Civil No. 79-507-B
Harold D. Vietor, Judge

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*The Honorable William A. Overton, United States District Court Judge for the Eastern District of Arkansas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1996

| | | |
|---|---|---|
| Russell Richard Dodson, | * | |
| Appellant, | * | |
| v. | * | Appeal from the United States |
| Polk County; Polk County Board of Supervisors; Polk County Offender Advocate; and Martha Shepard, Individually and through her official capacity as an Agent or Assistant for Polk County, | * | District Court for the Southern District of Iowa |
| Appellees. | * | |

Submitted: June 9, 1980

Filed: August 26, 1980

Before HEANEY and ARNOLD, Circuit Judges, and OVERTON*, District Judge

ARNOLD, Circuit Judge.

This appeal presents two related questions concerning the liability under

*The Hon. William R. Overton, United States District Judge for the Eastern District of Arkansas, sitting by designation.

42 U.S.C. §1983 of a county-employed public defender: First, whether a public defender, in representing an indigent defendant, acts under color of state law; and second, whether the defender enjoys immunity, either qualified or absolute, for conduct during that representation. The complaint alleged that Martha Shepard, an attorney in the Polk County, Iowa, Offender Advocate's office, failed to represent appellant adequately in his appeal of a robbery conviction to the Supreme Court of Iowa. Finding no state action, the United States District Court for the Southern District of Iowa dismissed the complaint as frivolous. We hold that a county-employed public defender does act under color of state law in representing indigent defendants and enjoys a qualified immunity from liability.

I.

We take the allegations of the complaint as true on this appeal. It alleged that Dodson had been convicted of robbery in an Iowa state court, and that Ms. Shepard was appointed to represent him on appeal. Subsequently, she moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous. Iowa R. App. P. 104 provides for dismissal of appeals found by the Supreme Court of Iowa to be "wholly frivolous." The motion was ultimately granted, and the appeal was dismissed. Dodson alleged in this case that Ms. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause of the Fourteenth Amendment. The

complaint set out pendent claims for malpractice and breach of an oral contract to prosecute the appeal.

The Polk County Offender Advocate and the Polk County Board of Supervisors, also named as defendants, were alleged to be responsible for Ms. Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals. The District Court dismissed the claims against Ms. Shepard and the Offender Advocate, a county public official who supervises public defenders, for lack of state action. The claims against Polk County and its Board of Supervisors were dismissed because, in the opinion of the District Court, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. Having disposed of all the constitutional claims, the District Court dismissed the pendent state claims as well.

The District Court, in a thoughtful opinion canvassing the existing authorities on the point, relied principally on the fact that a public defender, like private counsel, owes a duty of undivided loyalty to her client, and makes, or should make, decisions solely in the interest of the client. It may be true, and we assume for present purposes, that Polk County has no authority to direct or influence particular decisions that its public defenders make in the course of their representation of indigent defendants. It is also true, we assume, that the responsibility of a public defender, in terms of rules of ethics and standards of professional conduct, is the same in all respects as that of any other Iowa attorney, whether privately employed or court-appointed. In our view, however, the dispositive point is that the Offender Advocate and all his subordinates are

employees of the County, which in turn, of course, is merely a creature of the State of Iowa. All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point. Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them. In short, we are persuaded by the analysis, on this point, of Robinson v. Bergstrom, 579 F.2d 401, 404-08 (7th Cir. 1978) (per curiam). See also the useful discussion in Note, Liability of Public Defenders Under Section 1983, 92 HARV. L. REV. 943 (1979). We hold that an attorney

in a county or state funded public defender's office acts under color of state law in representing indigent defendants. We are mindful that other courts have reached the opposite conclusion,[1] but for the reasons we have stated we simply disagree.[2]

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[1] E.g., Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) (per curiam); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (per curiam); United States ex rel. Wood v. Blacker, 335 F. Supp. 43, 47 (D.N.J. 1971); Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); Brown v. Joseph, 463 F.2d 1046, 1047-48 (3d Cir. 1972) (dictum), cert. denied, 412 U.S. 950 (1973).

[2] Cf. Robinson v. Jordan, 494 F.2d 793, 795 (5th Cir. 1974) (per curiam) (county health officer acted under color of state law where prisoner had no choice of doctor). We do not question the often-stated rule that a private attorney appointed by a state court to represent an indigent defendant does not act under color of state law. E.g., Harkins v. Eldredge, 505 F.2d 802 (8th Cir. 1974) (per curiam).

II.

We next consider whether a public defender enjoys a degree of immunity from §1983 liability for actions taken while representing clients.[3] At the outset, we note that §1983 itself specifies no immunities; it imposes liability by its terms upon "every person," and reflects a determination by Congress that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, ____U.S.____, 48 U.S.L. WEEK 4389, 4397 (1980). It should be "construed generously to further its primary purpose." Gomez v. Toledo, ___U.S. ____, 48 U.S.L. WEEK 4600, 4601 (1980).

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[3] The District Court did not reach this issue, but it has been briefed in this Court and is purely a question of law. It is therefore appropriate for us to decide it now.

On the other hand, the Supreme Court has on occasion found that immunity was so deeply rooted in both the common law and public policy that it was not abrogated by §1983's silence on the question. Thus, Pierson v. Ray, 386 U.S. 547, 553-54 (1967), held that the absolute immunity afforded judges at common law was preserved under §1983, and absolute immunity was extended to prosecutors for the same reasons in Imbler v. Pachtman, 424 U.S. 409 (1976). Relying upon cases such as Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), and Robinson v. Bergstrom, 579 F.2d 401, 408-11 (7th Cir. 1978) (per curiam), appellees argue that we should extend absolute immunity to public defenders.

To do so, however, we would have to ignore Ferri v. Ackerman, ____U.S.____, 48 U.S.L. WEEK 4054 (1979), which held in the context of a malpractice action arising

under state law, that an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law. In the course of its unanimous opinion, the Court distinguished the function of a prosecutor or judge from that of appointed counsel. A judge or prosecutor, the Court noted, represents the interest of society as a whole, and absolute immunity gives them "the maximum ability to deal fearlessly and impartially with the public at large." Id. at 4057. On the other hand, the duty of appointed counsel is not to the public at large except in a very general way, but is to serve the undivided interest of his client, just as privately retained counsel do. Thus, the Court concluded "that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor . . . or judge

. . .," ibid., and this was the Court's primary rationale.

Although Ferri was not a civil rights action, its rationale is controlling here by analogy.[4] We perceive no distinction of substance, for immunity purposes, between appointed counsel and a public defender. Both owe primary allegiance to the client and represent the public interest only in a general way. If federal law does not immunize counsel appointed by a federal court from a state-law tort action, neither does it immunize a public defender from liability under 42 U.S.C. §1983 for a constitutional tort.

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[4] In White v. Bloom, Nos. 79-1853, 79-1893, slip op. at 8 (8th Cir., April 30, 1980), we applied the logic and holding of Ferri in a §1983 suit by an indigent defendant against his state-court-appointed lawyer. The state-action requirement, we said, would be satisfied by a sufficient allegation that appointed counsel conspired with state officials.

The fear that a disgruntled client will file suit under 42 U.S.C. §1983 does not conflict with the performance of a lawyer's duty, and may in fact provide incentive to perform competently. Counsel is presumably subject to a malpractice action under state law, anyway. For these reasons, we are compelled to deny the invitation to extend absolute immunity to public defenders.

On the other hand, we do not read Ferri to prohibit the implication of some degree of immunity in §1983 cases. In limited instances, the Supreme Court has held that public officials are entitled to a qualified immunity from damages under §1983. E.g., Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state hospital superintendent); Wood v. Strickland, 420 U.S. 308 (1975) (school

board member). A finding of qualified immunity is usually preceded by an inquiry into whether the public official in question enjoyed immunity at common law. There is, of course, no pre-§1983 common law with regard to the liability of public defenders. The dispositive question, then, is whether some degree of immunity is justified as a matter of public policy.

We believe that it is. Public defenders need the assurance that "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Wood v. Strickland, 420 U.S. 308, 321 (1975). The defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with

the malicious intention to injure his client. The touchstone is good faith. Id. at 322.

This degree of immunity from damage liability is justified for several reasons. It would be incongruous to grant such immunity to other public servants--such as police officers, school board members, prison officials, and state hospital superintendents -- who regularly exercise their discretion in ways that touch upon constitutional rights, and to deny this protection to public defenders. Lawyers representing indigent clients should feel free to exercise in good faith their professional judgment to decline to press the frivolous claim and to make decisions regarding strategy and tactics. These are the reasons for which they are employed. If they are not afforded some protection, they may act with trepidation, and indigent defendants will be the ones who ultimately lose in the

proc s. In addition, the law should not make it too difficult to recruit and hold vigorous and competent attorneys to represent indigent defendants. The grant of a qualified immunity is an appropriate compromise between these interests on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights are violated. We hold, therefore, that in §1983 suits attorneys employed by public defender offices enjoy the qualified immunity we have described for actions taken while representing indigent clients.

III.

We will comment briefly about the potential liability of Polk County, the Polk County Board of Supervisors, and the Polk County Offender Advocate. The District Court dismissed the claim against the

Offender Advocate for lack of state action, and we have found dismissal on this ground to be error. Whether the requisite personal involvement by the Offender Advocate in the claimed unconstitutional conduct was sufficiently alleged, however, is a separate issue which the District Court did not reach. Reading the allegations of the pro se complaint expansively, as we must, to determine whether relief might be justified on any possible theory, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam), we find that the complaint alleges that the Offender Advocate was responsible for Ms. Shepard's actions because he established rules and procedures for her to follow in handling criminal appeals. These allegations are sufficient, as a matter of pleading, to state a §1983 claim against the Offender Advocate. Cf. Monell v. New York City Dept. of Social Services, 436

U.S. 658, 690-95 (1978). Similar allegations were made as to the involvement of the Polk County Board of Supervisors, and we hold that the complaint is sufficient to state a claim against the Board members for the same reason.[5] These individuals, of course, will enjoy the same degree of immunity as the Offender Advocate and Ms. Shepard. Wood v. Strickland, 420 U.S. 308 (1975). In addition, it may become clear, through discovery or otherwise, that the rules and procedures referred to in the complaint had nothing to do with Ms. Shepard's actions in Dodson's case. In that event, it may be appropriate to renew the no-personal-involvement defense by motion for summary judgment.

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[5] There can be no question that the members of the Polk County Board of Supervisors, in carrying out the responsibilities of that office, act under color of state law.

The final question is whether the complaint, liberally construed, states a cognizable claim against Polk County as an entity. Even though we interpret the allegations expansively, we are unable to say that the complaint alleges the necessary county involvement in the claimed unconstitutional conduct by virtue of the execution of county policy or custom.[6] Monell v. New York City Dept. of Social Services, supra, at 694. The appellant did not have counsel in the District Court,[7] and was given no opportunity to meet any objections

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[6] The portion of the complaint which names Polk County reads as follows: "Polk County is enjoined [sic - perhaps "joined" is meant] in this action because it is the political basis, and the source that authorized it's [sic] political subdivisions and it's [sic] quasi-contractants to act in the manner prescribed in this complaint . . ."

[7] On remand, the District Court may wish to allow appointed appellate counsel to continue representing Dodson. The presence of counsel often makes it easier for district courts to manage and decide this kind of case expeditiously and fairly.

to the sufficiency of the complaint which might have been raised. On remand, the appellant should be given the opportunity to amend to state his claim against the County with more specificity. We intimate no opinion whether the County is entitled to any immunity.[8]

IV.

The District Court was correct in dismissing the claim for an injunction commanding Dodson's release. This claim is in the nature of habeas corpus, and it is conceded that state remedies have not been exhausted. On this question, we affirm.

V.

The judgment (except as noted in Part IV of this opinion) is reversed, and this

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[8] Owen v. City of Independence, supra, held that municipalities have no qualified immunity under §1983 for their good-faith constitutional violations.

case is remanded for further proceedings consistent with this opinion. On remand, the District Court should reinstate the pendent state-law claims, subject, of course, to appropriate action if the federal claims should later be dismissed for any reason.

Affirmed in part, reversed in part, and remanded.

OVERTON, District Judge, dissenting.

I disagree with the conclusion that a public defender representing an indigent defendant operates under color of state law, a jurisdictional requirement for an action under 42 U.S.C. §1983.

The still valid test for determining whether a person is acting under color of state law is the language in United States v. Classic, 313 U.S. 299 (1940) at Page 326: "Misuse of power, possessed by virtue of state law and made possible only because

the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (emphasis added). See also, Monroe v. Pape, 365 U.S. 167, 18387 (1961); Williams v. United States, 341 U.S. 97, 99 (1951); and Screws v. United States, 325 U.S. 91, 108-113 (1945).

The alleged wrongs of defendant, Shepard, were not "made possible only because" she was a public defender. She could have rendered the same alleged ineffective assistance of counsel as a retained attorney or as an appointed counsel. All but one circuit considering the question have reached the conclusion that such a wrong is not under color of state law. Skipper v. Brummer, 598 F.2d 427 (5th Cir. 1979) (per curiam); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) (per curiam); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (dictum); and

Brown v. Joseph, 463 F.2d 1046, 1047-48 (3rd Cir. 1972) (dictum), cert. denied, 412 U.S. 950 (1973).[1] The Seventh Circuit, in Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (per curiam) stands alone with its decision to the contrary. Moreover, it seems fairly significant that the Robinson court, while stating that a public defender acts under color of state law, also held that the defender enjoys absolute immunity from suit rather than the qualified immunity which the majority confers in this instant case. Id. at 410-411.

The majority, in concluding that a public defender's relationship to the client is different from any other attorney,

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[1] Additionally, these published District Court decisions support the conclusion that public defenders do not act under color of state law: United States ex rel. Wood v. Blocker, 335 F. Supp. 43, 47 (D.N.J. 1971) and Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968).

relies upon (1) the fact that the public defender is hired, paid and subject to fire by the county, and (2) the fact that the indigent defendant has no choice in selecting his lawyer. By the same token, a court appointed attorney is (1) usually selected and paid by the state and (2) is not usually the product of the indigent's selection. Yet, this circuit has consistently held that neither retained nor appointed attorneys are liable under 42 U.S.C. §1983 for deprivation of constitutional rights, because they do not act under color of state law. Harkins v. Eldredge, 505 F.2d 802, 803 (8th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Harley v. Oliver, 539 F.2d 1143, 1145-46 (8th Cir. 1976). See also, White v. Bloom, No. 79-1858 (8th Cir. Slip Op. Apr. 30, 1980).

The reasoning for a conclusion that public defenders do not act under color of state law is best stated in Ferri v. Ackerman, 444 U.S. 193 (1979). Although the issue in Ferri was the question of immunity for an attorney appointed by a Federal Court and paid for his services with federal funds, the decision addressed the argument that court appointment and payment with public funds changed the traditional attorney-client relationship. The Court answered the question by stating:

> ". . . the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in incurring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the individual interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently

of the government and to oppose it in adversary litigation." 48 U.S. Law Week at Page 4057.

In my view, there is simply no sound basis for distinguishing the public defender's role as attorney for his client from that of any other attorney because of the source of his remuneration. Indeed, the positions taken by the public defender are always adverse to those of the state. It is difficult for me to conclude that the public defender is acting under color of state law while entering "not guilty" pleas, moving to suppress state's evidence, objecting to evidence at trial, cross-examining state's witnesses and making closing arguments in behalf of defendants.

While I would decide the claim against Ms. Shepard on the initial jurisdictional point that the public defender does not act under color of state law and thus not reach the merits of the immunity question, I am constrained to state my further dis-

agreement with the majority on the matter of immunity from suit. Like the Seventh Circuit panel in Robsinson v. Bergstrom, supra, I would hold that the public defender enjoys the same absolute immunity from suit as that of the prosecutor announced in Imbler v. Pachtman, 424 U.S. 409 (1975).

My concern is that the present scheme of the law leaves the disgruntled 1983 claimant with one clear target for his anger and frustration with the criminal justice system. The judge and prosecutor are clearly immune from suit and the court appointed counsel is "not acting under color of state law," Ferri v. Ackerman, 444 U.S. 193. But the majority here has held that the claimant may vent his frustration by suing the public servant who defended him. It seems clear that policy reasons should counsel heavily against subjècting the

public defender to such liability. Such officers are notoriously overworked and underpaid. Placing on them the burden of defending suits which are often without merit[2] can only make the job of finding competent, permanent staff for public defender offices more difficult. As Judge Anderson stated for the Ninth Circuit in Miller v. Barilla, supra, (holding the public defender absolutely immune under §1983),

> "Any qualified immunity doctrine would force defense of suits well through the pleading stages, and place a substantial drain on an already burdened legal services resource. Additionally, each public defender 'would be constrained to weigh every decision in terms of potential liability,'"

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[2]The Reports of the Judicial Conference—Report of the Administrative Office, U.S. Courts, 1979, at 221-222, states that filings by state prisoners in civil rights cases increased to 11,195 in 1979, a 15.1% increase over 1978, and a 451.5% increase over 1970. The report of the Federal Judicial Center, 1980 Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, at page 9, indicates that 96.5% of the §1983 cases terminated in federal courts in 1979 were dismissed or otherwise concluded prior to trial.

quoting Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).

It should be noted that the Ninth Circuit in Miller, while holding the public defender absolutely immune under §1983, did not reach the question whether the officer acts under color of state law. This may, of course, be criticized as a decision of the merits without first resolving a jurisdictional controversy. But it further illustrates the currently confused and conflicting state of the law in the various circuits. The Seventh and Eighth Circuits hold a public defender acts under color of state law, but the Seventh Circuit grants an absolute immunity while the Eighth gives a qualified one. The Fifth and Tenth Circuits say, in per curiam opinions, that a public defender does not act under color of state law. And the Ninth Circuit says

the immunity of public defenders is absolute, therefore the question of color of state law need not be reached.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Des Moines, Iowa

Filed November 5, 1979

Before

Hon. HAROLD D. VIETOR, District Judge

Civil No. 79-507-B

RUSSELL RICHARD DODSON,

Plaintiff,

v.

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Defendants.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| RUSSELL RICHARD DODSON, | * | |
| Plaintiff, | * | CIVIL NO. 79-507-B |
| v. | * | |
| POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE AND MARTHA SHEPARD, individually and through her official capacity as an agent or assistant for Polk County, | * | ORDER OF DISMISSAL |
| Defendants. | * | |

---

The Court has before it for initial review a pro se complaint submitted by Plaintiff, an inmate of the Iowa Men's Reformatory at Anamosa, Iowa. The complaint is brought under 42 U.S.C. §1983, and jurisdiction is predicated upon 28 U.S.C. §1343. Plaintiff has submitted an affidavit of indigence and a request for

leave to proceed in forma pauperis.

The events giving rise to this action arose out of plaintiff's conviction for robbery in the Iowa District Court. Following his conviction, defendant Martha Shepard, an attorney in the office of the Polk County Offender Advocate, was appointed to represent plaintiff on appeal. Subsequently, Ms. Shepard moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous pursuant to Iowa R. App. P. 104.[1] The Iowa Supreme Court granted the motion and dismissed plaintiff's appeal.

Plaintiff contends that Ms. Shepard's actions deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the

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[1] Iowa Rule of Appellate Procedure 104 provides for dismissal of appeals found by the Supreme Court to be "wholly frivolous."

due process clause of the Fourteenth Amendment. In addition, plaintiff presents jurisdiction claims for malpractice and breach of oral contract. Plaintiff requests damages and release from confinement.

The claim for release from confinement is treated as a request for habeas corpus relief under 28 U.S.C. §2254. Preiser v. Rodriguez, 411 U.S. 475 (1973). Because plaintiff has not exhausted his state remedies by seeking post-conviction relief under Iowa Code Chapter 663A, as required by 28 U.S.C. §2254(b) and (c), the Court will not now take cognizance of his claim for release.

Relief under 42 U.S.C. §1983 is available only if the action of the defendant or defendants was "under color of" state law. This requirement is an essential

jurisdictional predicate. Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978).

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941). This definition has repeatedly been reaffirmed. Monroe v. Pape, 365 U.S. 167, 183-87 (1961); Williams v. United States, 341 U.S. 97, 99 (1951); Screws v. United States, 325 U.S. 91, 108-113 (1945).

Many federal courts, including the United States Court of Appeals for the Eighth Circuit, have held that a privately practicing lawyer appointed by the court to represent an indigent defendant in a criminal case does not act "under color of"

state law in representing the defendant. United States ex rel. Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976); Harkins v. Eldredge, 505 F.2d 802, 803 (8th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057, 1060-61 (8th Cir. 1973); O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1970); French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Indeed, no case to the contrary can be found.

The weight of authority holds that a lawyer in a public defender's office[2]

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[2] The Polk County Offender Advocate does not exist under the authority of Iowa Code Chapter 336A, which authorizes counties to establish the office of Public Defender. The Offender Advocate is the independent creation of the Polk County Board of Supervisors. It or one of its lawyers is appointed by the court to represent indigent defendants. It has a salaried lawyer director and several full time salaried lawyers. It is fully funded by Polk County. The Court takes judicial notice of the facts set forth in this footnote.

appointed by the court to represent an indigent defendant in a criminal case also does not act "under color of" state law in representing the defendant. Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972); Clark v. Brandom, 415 F. Supp. 883 (W.D. Mo. 1976); Berryman v. Shuster, 405 F. Supp. 1346 (W.D. Okla. 1975); United States ex rel. Wood v. Blacker, 335 F. Supp. 43 (D.N.J. 1971). Cf. Peake v. County of Philadelphia, 280 F. Supp. 853 (E.D. Pa. 1968). The only case found to the contrary is Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). In Robinson the issue is thoroughly analyzed, and the Court reaches its result by concluding that the Public Defender was "an instrumentality of the state" and that defendant Bergstrom, a part-time Assistant Public Defender, "acted on

behalf of a state instrumentality" in representing plaintiff as his court-appointed counsel in a criminal case. Id. at 407-08.

I respectfully disagree with the Seventh Circuit's conclusion in Robinson that a lawyer in a public defender office acts on behalf of the public defender in representing a defendant in a criminal case. He acts only on behalf of his client, the defendant. His "professional duties and responsibilities toward his clients are identical in all respects to any other . . . attorney whether privately retained or court-appointed." Espinoza v. Rogers, supra, 470 F.2d at 1175.

The following language from Sanchez v. Murphy, 385 F. Supp. 1362 (D. Nev. 1974), a diversity legal malpractice case against a Public Defender and Deputy Public Defender

based on alleged malpractice of the Deputy, is instructive:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial. Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance. As noted, the relationship thus created is a strictly professional one. It is a personal relationship of trust and confidence governed by the canons of professional ethics under which the attorney owes an obligation of unswerving loyalty and devotion to the interests of his client.
>
> True, the Nevada statutes (fn.1) create only the office of public defender. True, the courts normally appoint "the public defender" to represent a defendant. The public defender appoints deputies and assigns a case to a

> deputy. If the nomenclature "deputy" is conclusive, the public defender is responsible for the deputy's malpractice. We think the name designation is not conclusive. The personal attorney-client relationship established between a deputy and a defendant is not one that the public defender can control. The canons of professional ethics require that the deputy be "his own man" irrespective of advice or pressures from others. A deputy public defender cannot in any realistic sense, in fullfillment of his professional responsibilities, be a servant of the public defender. He is, himself, an independent officer.

Id. at 1365.

In United States ex rel. Wood v. Blacker, supra, the court noted that the state's public defender act did not clothe public defender lawyers with a "power" that they did not already possess, and that public defender lawyers were empowered to represent criminal defendants by virtue of being licensed to practice law. The court added: "Moreover, though remunerated by the State

of New Jersey, these public defenders were neither servants nor representatives of the State, nor were they controlled by the State." 335 F. Supp. at 47. See Peake v. County of Philadelphia, supra, 280 F. Supp. at 854.

Establishing a public defender office is merely a means of administering the state's obligation to provide counsel to indigent defendants in criminal cases. Another means is appointment of privately practicing lawyers. The nature of the representation of an indigent defendant by a public defender is identical to the nature of the representation of an indigent defendant by a court-appointed privately practicing lawyer. In neither case is the power allegedly misused "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," which is the classic

case definition of action taken "under color of" state law.

The actions of defendants Shepard and the Polk County Offender Advocate were not "under color of" state law, and therefore plaintiff has failed to state a claim against those defendants cognizable under 42 U.S.C. §1983.

Plaintiff has also failed to state a cognizable claim against Polk County and its Board of Supervisors. Assuming, but not deciding, that the Board of Supervisors is a "person" within the meaning of section 1983, plaintiff has not alleged the requisite personal involvement necessary to impose liability under this statute. See Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1972). Th doctrine of respondeat superior is not recognized in actions brought pursuant to 42 U.S.C. §1983. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691

(1978). The claim against Polk County is likewise based upon the theory of respondeat superior and therefore is not cognizable under section 1983. Local governments are liable under section 1983 only if the alleged constitutional deprivations occurred pursuant to the execution of its policies or custom. Id. at 694.

Because plaintiff's section 1983 claims are not cognizable, his pendent jurisdiction claims must also be dismissed. Kurz v. State of Michigan, 548 F.2d 172, 175 (6th Cir. 1977).

IT IS ORDERED that plaintiff's complaint be filed without prepayment of costs for the purpose of making a record.

IT IS FURTHER ORDERED that the above-entitled action be, and hereby is, dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

DATED this 2nd day of November, 1979.

HAROLD D. VIETOR
United States District Judge

No. 80 - 824

Office-Supreme Court, U.S.
FILED
1981
ALEXANDER L. STEVAS,
CLERK

In The

# Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

*VS.*

RUSSELL RICHARD DODSON,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## JOINT APPENDIX

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*ATTORNEYS FOR PETITIONERS*

Petition for Certiorari filed November 21, 1980
Certiorari granted March 2, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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NO. 80-824

---

POLK COUNTY BOARD OF SUPERVISORS;
POLK COUNTY OFFENDER ADVOCATE; and
Martha Shepard, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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INDEX

---


| | Page |
|---|---|
| Chronological List of Relevant Docket Entries. . . . . | iv |
| Dodson's Motion to Proceed with Leave in Forma Pauperis filed Nov. 5, 1979. . . . . | 1 |

| | Page |
|---|---|
| Dodson's Complaint filed Nov. 5, 1979. . . . . | 4 |
| Order of Dismissal filed Nov. 5, 1979. . . . . | Pet. for Cert. App. B |
| Dodson's Motion to Reconsider Order or in Alternative, Motion for Leave to take an Interlocutory Appeal in Forma Pauperis filed Nov. 15, 1979. . . . . | 24 |
| Ruling on Motion, Amendment to Order filed Nov. 20, 1979 . . | 44 |
| Notice of Appeal from the U.S. District for the Southern District of Iowa filed Nov. 23, 1979. . . . . | 47 |
| Notice of Appointment of John D. Hudson as Counsel for Appellant in Appeal to Eighth Circuit Court of Appeals filed Feb. 4, 1980. . . . . | 48 |
| Opinion of Eighth Circuit Court of Appeals filed August 26, 1980. . . . . | Pet. for Cert. App. A |
| Order of the U.S. Supreme Court granting Petition for a Writ of Certiorari, filed March 2, 1981. . . . . | 49 |

Page

Order of the U.S. Supreme Court granting Respondent's Motion for Leave to Proceed in Forma Pauperis, filed March 2, 1981. 50

Order of the U.S. Supreme Court Appointing John D. Hudson to serve as counsel for Respondent, filed March 23, 1981 . . 52

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 5, 1979 - Dodson's Motion to Proceed with Leave in Forma Pauperis filed in U.S. District Court for the Southern District of Iowa, Central Division

Nov. 5, 1979 - Dodson's Complaint filed in U.S. District Court

Nov. 5, 1979 - Order of Dismissal filed by U.S. District Court

Nov. 15, 1979 - Dodson's Motion to Reconsider Order or in Alternative, Motion for Leave to Take an Interlocutory Appeal in Forma Pauperis filed in the U.S. District Court

Nov. 20, 1979 - Ruling on Motion, Amendment to Order, and Order by U.S. District Court.

Nov. 23, 1979 - Notice of Appeal filed with the Eighth Circuit Court of Appeals.

Feb. 4, 1980 - Notice of Appointment of John D. Hudson as Counsel for Appellant in Appeal to Eighth Circuit Court of Appeals.

Aug. 26, 1980 - Opinion of Eighth Circuit Court of Appeals.

March 2, 1981 - Order of U.S. Supreme Court granting Petition for a Writ of Certiorari.

March 2, 1981 - Order of the U.S. Supreme Court granting Respondent's Motion for Leave to Proceed in Forma Pauperis.

March 23, 1981 - Order of U.S. Supreme Court Appointing John D. Hudson to serve as Counsel for Respondent.

* * * * * * *

The following opinions and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

Opinion of the U.S. District Court for the Southern District of Iowa, Central Division, filed Nov. 5, 1979. . . . . Petition for Certiorari App. B

Opinion of the Eighth Circuit Court of Appeals, filed August 26, 1980. . . . . Petition for Certiorari App. A

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | |
|---|---|
| RUSSELL RICHARD DODSON<br><br>Plaintiff,<br><br>vs.<br><br>POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATES and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,<br>Defendants. | CIVIL CASE NO.<br><br>79-507-B |

MOTION TO PROCEED WITH LEAVE IN FORMA PAUPERIS
(Filed November 5, 1979)

COMES NOW the Petitioner Russell Richard Dodson and moves this Court for leave to proceed in this action in Forma Pauperis, pursuant to /28/ U.S.C. sec 1915(d) without first being to pre-pay fees and costs or otherwise being required to give security therefore.

In support of this motion Petitioner

has attached his affidavit of poverty hereto.

Respectfully Submitted,

/s/ _____
Russell Richard Dodson

AFFIDAVIT OF POVERTY

I, Richard Russell Dodson, being first duly sworn according to law, deposes and states:

1. I am the Plaintiff in this above titled action;

2. I bring this action in good faith;

3. This action seeks to enjoin the Defendants and other parties to this action and recover monies for damages and deprivations therefrom;

4. I believe that I am entitled to the redress and relief sought in this action;

5. I have read and know the contents of this action and hold it to be true;

The only money that I own is that sent to me by my family for the purpose of personal maintenance, I presently have $15.00 in my prison account . . . other than the above money received by me from my family, I have no other income and have not worked at a paying job since March 1st 19 because of my poverty I am unable to pay costs of this action, to give security therefore, or employ an attorney.

/s/_____
Russell Richard Dodson
P.O. Box B
Anamosa, Iowa 52205
PRO SE

Subscribed and sworn to before me this 3rd day of October, 1979 at Anamosa, Iowa.

/s/_____
Notary Public

COMPLAINT
(filed November 5, 1979,
in the United States District Court
for the Southern District of Iowa)
[Title omitted in printing]

LEGAL MAL-PRACTICE
PUNITIVE DAMAGE
NOMINAL DAMAGE
INJUNCTIVE RELIEF

COMES NOW Plaintiff, authorized and pursuant to Federal Civil Rights Act /1871/ and further with consistance to Federal Civil Rights Act Title /42/ of the United States Code Sec. /1983/ to redress the deprivation under state color of law.

STATEMENT

I above named Russell Richard Dodson Plaintiff am now and as of March 12th, 1979 have been in the custody and a prisoner of the State of Iowa, under the supervision of the Dept. of Corrections. I am presently confined in the Men's Reformatory at Anamosa, Iowa County of Jones 52205 under Warden Calvin Auger, I am identified by the No. #204693-7.

Polk County is enjoined in this action because it is the political basis, and the source that authorizes it's quasi-contractants to act in the manner prescribed in this complaint;

Polk County Board of Supervisors are enjoined because from the powers invested through them from Polk County they established and layed out the grounds rules for Polk County Offender Advocates Office to abide by while acting as agents and assistants under the supervision and control of the Board of Supervisors and are held liable for their employee's acts or any imuted negligence therefrom;

Polk County Offender Advocates maintain the direct responsibility and this office is enjoined because the whole office staff at one time or another have practiced in the same manner complained about and will be further enjoined when this complaint is amended into a class action by other plain-

tiff's that were subjected to this same form of legal mal-practice this office conducts in;

Martha Shepard is held individually liable for punitive damages in that it is her misrepresentation and conduct, is the direct result of the mental anguishes and deprivation that Plaintiff is complaining about. Her neglect is the direct cause of why Plaintiff has not filed an appeal, thus causing a delay, constituting a lower period for Plaintiff to be subjected to the conditions of prison which are constantly humiliating and a great burden that out weighs his mentality, and forces Plaintiff to endure the strains and pains therefrom; still further Ms. Shepard verbally contracted her service to Plaintiff from this built Plaintiff's hope and respect, but from what ever political pressure, adverse inference, bad faith or neglect Ms. Shepard has completely des-

troyed all Plaintiff has built up, while nervously waiting for eight /8/ months to hear the progress of his appeal he is sent a letter stateing the appeal has no merit breaching her verbal contract and leaving Plaintiff to suffer therefrom;

QUASI-CONTRACT LIABILITY

All of the above Dept's Agencies Asso's and individuals are involved in a circulation of transferred responsibilities all derived from the main source from which Polk County invested in them thus making all parties liable as one and enjoining them as the same.

BASIS OF THIS ACTION

On or about the 9th of March 1979 Plaintiff was appointed Offender Advocate, Martha Shepard to perfect an appeal to which a verbal contract was agreed upon between Plaintiff and Defendant, from the above date Plaintiff was under the impression that briefs to support this appeal

was being drawn up and put together for arguments in the Supreme Court. On September 10th 1979 Plaintiff receives a letter from Defendant all adverse to the above and no appeal has been filed leaving Plaintiff to suffer therefrom.

COMMENCEMENT OF ACTION

This is the incipiant state of, for an application as well as the incipiant stage of a class action for those case citings which are included, and have all been subject to this same practice from this same office in the last two /2/ years and all are in this institution at this time as well as Defendant-Plaintiff;

Defendant-Plaintiff comes before this Court and contends pursuant to the Code of professional responsibility, consistant with canons, ethical consideration and disciplinary rules, that a lawyer should assist maintain represent protect exercise diligence through zealous attitudes, protect

the clients interests, employing no deceptive practices, not to hold any position that would conflict or tend to be adverse to properly setting up the defense and doing the same within the bounds of the law;

Plaintiff further contends through abstraction; that Ms. Martha Shepard is individually liable and as well as through her official capacity, litigator for Polk County's Offender Advocate Office in quasi-contract with Polk County with powers invested therefrom, in responsibility through stipulation of contract and obligation that requires her to exercise her mind in accordance with the legal training she received, that qualifies her as and advocate, and in doing so, it is her responsibility, to investigate review and study the events, motions, procedures and all material facts pertaining to this case cited as 13950, and on ascertaining to set out the facts, that constitute error violation mistakes

mis-carriages and in general prejudicial and un-constitutional rulings orders decisions and or procedures.

Still further it is contended that Ms. Martha Shepard exercised apthy and clearly neglected her responsibilities as a lawyer; in that she played on the intellect and manipulated the mentallity of an un-trained incompetent generally educated, mind which is that of the Defendant-Plaintiff which was un-able to assert any cliams which would have a proper foundation or a basis for the Courts to entertain them for merit and Ms. Shepard knowing the same still exerciseing fraudulent conduct concludes that the appeal or any procedure thereafter would be frivolous;

Plaintiff contends, this practice is not only acting in bad faith, gross negligence and abusing the process, but clearly a form of legal mal-practice;

Plaintiff was appointed counsel, to

represent and protect his interests, while perfecting an appeal, this contract recognized by the law, from stipulations by the A.B.A. I.B.A. as well as the code of professional responsibility as that in which all attorney's will perform; also there was a verbal contract between Ms. Shepard and Mr. Dodson consituted another bond that holds this attorney to represent in the best of ways as she decietfully stated;

These agencies asso.s and codes further point out that an advocate that has been permitted, with license and authorized as being qualified are there to advise and assist Plaintiff specifically points out Canon 2, Recognition of Legal Problems E.C. 2-2, the legal profession should assist lay-persons to recognize legal problems, because such problems may not be self-revealing and are often not timely noticed: This is pointed out and concluded with, the fact that Ms.

Shepard took three /3/ issues that Defendant Plaintiff thought were grounds to raise on appeal: There is no showing as to where she even attempted, to point out any grounds, but it is clearly shown where she found grounds to knock this appeal, it would appear that this counsels diligence and zeal was all spent researching for the prosecution and nothing for the defense in perfecting an appeal;

Plaintiff includes Canon /3/ E.C. 3-5 its pointed out, because it further defines the conduct of a lawyer;

Defendant-Plaintiff contends that Ms. Shepard has clearly clearly taken the informations collected in this Case 13950, and improperly used it against him in an attempt to terminate employment which has caused Plaintiff great amounts of mental anguishes, which will be later set out in this action; she has taken all the facts, events claims and procedures, and applied them to references that would deny Defendant-Plaintiff

an appeal. This is highly adverse to Canon /4/ E.C. 4-5 and the opposit to what she agreed to do through verbal contract, through code stipulation and what she was employed for in the first place;

Defendant-Plaintiff sets out a practice that fraudulent and completely defeats itself: but purports to be of benefit and protection to the indigent persons.

The process, by which the County establishes retains and maintains, advocates out of law school and held as publics defenders (Offender Advocate of Polk County) this is the biggest collection of fraudulent devices, since counter-fiet twenty /20/ dallor bills and their plates: The above clearly, is self explanatory as with further references, to review this agencies records and files in regards to winning cases, as opposed to plea bargaining, straight guilty pleas, probation agreements, straight loses and over all

the issue about the grammy award winning "Frivolous Appeal" pursuant to F.R.A.P. /104/ that each and every advocate of this office has put in on more than several occaisions, and without the slightest amount of speculation and nil amount of suspicion they are granted; and many persons are left without any relief "because this termination is granted because the trial was perfect and no errors ever arised";

The other parties of this class action are all from Des Moines, Iowa all were represented by Offender Advocate of Polk County, and all were so unsuspiciously, unfortuneanate to have a frivolous appeal;

Defendant-Plaintiff is vacilating as to a decision in regards to why the courts have not taken it upon themselves to investigate, when the above mentioned would lead a professional mind to look at what the context of Canon 5 E.C. 5-23 states; and to practice what this complaint is about, which clearly conflicts with the whole

code of professional responsibility, not to leave out the prejudicial effect toward the Defendant-Plaintiff and the consitutional violations therefrom. Plaintiff seeks to enjoin the parties of this action in this court and recover monies and compensation for damages that came in the form of mental anguishes pains and sufferings and constitutional deprivations and violations that are prejudicial thereby; This matter in controversy exceeds exclusive of interests and costs the sum of $175,0000 00 divided as follows;

Plaintiff seeks the sum of $100,000.00 relief for legal mal-practice.

Plaintiff seeks the sum of 50,000.00 relief for punitive damages

Plaintiff seeks the sum of 25,000.00 relief for nominal damages

Plaintiff further seeks an injunctive restraint to vacate and set aside this sentence

It is held that a prisoner who has been effectively deprived of his rights to appeal, by deception practiced on him by his counsel, is entitled to motion for vacation and setting aside sentence. . . See Desmond v. U.S, C.A. Mass. 1964 333 F2d 378, on remand 345 F.2d 225 14 A.L.R. 3rd 718 and Dansby v. U.S. D.C. N.Y. 1968 291 F. Supp. 790

Plaintiff contends he has layed out the four /4/ classic elements for a cause of action for negligence

1. Legal duties of Ms. Shepard
2. Breach of these duties
3. The casual relation between client and attorney that was established
4. And the damages sustained therefrom

Plaintiff again enjoins Martha Shepard as the Defendant for legal mal-practice and negligence and holds her employers and her liable for damages

CLAIM

Plaintiff makes claim that his 6th 8th 14th Amendments Rights to the Constitution of the United States by the neglect and legal mal-practices of Defendant Martha Shepard

CAUSE OF ACTION

Plaintiff contends that leading a person to believe that they are your friends and here to help and further tell a person that they are legally obligated to your cause and will do the best to repress and protect your interests and secure your release will overwhelm and mentally strengthen a person, under the conditions of prisons and not only gives a person hope and the feeling of trust and appreciation, but relieve that person of all the burdens of worrying and doing all this within a six to eight months period conditions a person and through this conditioning, a positive mental out-look and attitude is projected

from knowing the same, but without even the slightest amount of warning or any notion as to the advesary procedures and the straight out lies and deception told and prcticed, Plaintiff recieves a letter in the mail from Defendant Martha Shepard that sent Plaintiff off in a thoughtless and reckless mental rage, that has left Plaintiff completely in a trama and syndromatically pissed off, this letter stated to Plaintiff, that his appeal was not filed and that it is not going to be filed by Ms. Shepard and that Defendant Martha Shepard wished to terminate because the low merit of the appeal grounds. This letter distinctively shows where Ms. Shepard spent all her time re-searching adverse dis-advantage and prejudicial materials and grounds that apply to why Plaintiff should not have the right to an appeal, this adverse conflicting practice was not what Ms. Shepard had been telling Plaintiff for months. Plain-

tiff had been conditioning himself for months from what Ms. Shepard had told him, how she diligently and zealously perfecting his appeal with persistance in re-assurring him that she is doing her best, Plaintiff abided, by temporarily accepting the conditions of prison, then all of a sudden Plaintiff is severely struck in the mind with the sharp and painful instruments of bad faith, apathy, neglect, deciet, ill will deception, and above all unrestrained power, which constitutes legal mal-practice, which inturn has deprived Plaintiff of his constitutional guarantees that has severely caused Plaintiff great amounts of mental pains anguishes and sufferings, that are, has and will continue to cause Plaintiff irreparable damage. These acts and conducts have destroyed Plaintiff's insitutional objectives and goals Plaintiff has set for the future, Plaintiff is persistantly confussed, upset and scared and has a recently learned dis-trust for lawyers. Plaintiff

further contends that Ms. Shepard should forever be barred from the practices of law and any other public service, because her conduct is ill, deceptive, and above all very damaging to the human mind.

In furtherence it is contended that Ms. Shepard should have never undertook, verbalized a contract to lead Plaintiff to believe she was righteously and honestly devoted and obligated to his cause if her intentions were deviate as they show, this is cruel and unusual treatment that has deprived Plaintiff and left him to suffer therefrom.

Plaintiff wishes to appeal and has attached his brief hereto. Plaintiff has also attached several case citings that will later amend this complaint into a class action. Plaintiff's actions is held as the incipiant stages and represents and honors as many as two /200/ hundred inmates that have been subjected to this same prac-

tice complained about and effectively and systemattically deprived of their right to appeal, also including those who in the future, if this practice is not altered or corrected, to protect the rights that are secured by the United States Constitution.

Plaintiff pursuant to Secs./2201 & 2202/ Title /28/ U.S.C. seeks declatory judgment and injunctive redress and relief for the multiple prejudicial cumulative acts and conduct by the Defendants, resulting from mental anguishes sufferings and pains constituting irreparable damages, further constituting inflictions of humiliations that lacerate feelings and emotions from the deprivations.

Plaintiff seeks to enjoin the parties in this Court and recover the sum of 175,000.00 and further to seek the injunctive relief This matter is clearly in violation of Plaintiff's 6th 8th & 14th amendment rights secured by the Constitution to the United States and Article I Secs. 9,10,17 &

25 to the Constitution of the State of Iowa and clearly adverse to the code of professional responsibility.

Plaintiff clearly shows herein the arbitrary capricous specticles acting in and through the power vested in by Polk County, which sought no other purpose other than to satisfy itself . . . adversly purporting; yet intended to serve not the individual but the County from which its established retained and maintained;

The cumulative and inter-related effects are significant and are the over-all constittutional equasion before this Court;

Plaintiff comes before this Court and states, because the acts and conduct and treatment herein described, Plaintiff prays for relief, for the sum indicated and demanded upon the Defendant parties of this action and in the interest of justice be granted;

Plaintiff deposes and states that I, Russell Richard Dodson in Pro Se am the

Plaintiff of this action and am mentioned as the same or Defendant-Plaintiff throughout, this action is brought in good faith, and I am aware of the contents of this action and hold it to be true and correct.

Respectfully submitted

/s/ _____
Russell Richard Dodson
P.O. Box B
Anamosa, Iowa 52205
PRO SE

Subscribed and sworn to before me this 3rd day of October 1979 at Anamosa, Iowa

/s/ _____
Notary Public

CC:RRD

Copies to Clerk of Court and
Defendants via Clerk of Court:

MOTION TO RECONSIDER ORDER
OR IN ALTERNATIVE,
MOTION FOR LEAVE TO TAKE AN
INTERLOCUTORY APPEAL IN FORMA PAUPERIS
(Filed November 5, 1979,
in the United States District Court
for the Southern District of Iowa)
[Title omitted in printing]

COMES NOW Petitioner, Russell Richard Dodson and moves this Court, to reconsider it's Order of November 5th 1979, which dismissed Plaintiff's complaint as frivolous and for lack of state remedies exhaustion, and for failing to state a claim for enjoining liability purposes. In the alternative Petitioner respecably requests leave to take an interlocutory appeal from said Order In Forma Pauperis. The grounds of this motion are;

1. It appears, that the Courts have completely been mis-guided in there interpretation of the issues that were brought before the courts (See Plaintiff's Exhibit of Explanation, herein attached)

2. It appears that the courts have taken it upon themselves to entertain Plaintiff's injunctive clause as proceedings under habeas corpus 2254 Title 28 U.S.C., Petitioner respectfully states; the courts erred, were wrong, and blindly looked past what was held in: Desmond Vs U.S,. C.A. MASS. 1964 333 F2d 378, on remand 345 F.2d 225, 14 A.L.R. 3rd 718 and Dansby Vs. U.S. D.C.N.Y. 1968 291 F. Supp. 790 (See Petitioner's Exhibit of Explanation, herein attached)

3. It appears, that the action titled 79-507-B, was independent, and individually entertained, and such proceedings were had in a different court, other than the court, were the appeal for 13950, and the subsequent application pursuant to R.A.P. were had, if this is found to be true and correct, then the initial confusion, that caused this court to error in its findings, was caused therefrom. And upon such findings, ground would be properly layed for this

court to sustain this motion, and reconsider its Order, and review this cause again from the right perspective, or to transfer it to the proper court.* Petitioner adds that he just received through the mail, the Order and knows for sure that the action titled 79-507-B was had in a different court, than....District Court CR.NO. 13950 was entertained, the Courts noted that Defendant, had failed to communicate with this court, concerning whether he desires to pursue the appeal, even though more than thirty days have passed, since counsel served a notice of the Application. Under Iowa R. App. P. 104(g), we may deem such a failure to be an agreement with counsel's decisions that the appeal is frivolous.

Petitioner states this would be true if that were the case, but this is not the case, because, Petitioning-Plaintiff-Defendant, did move for communications with the

courts, within the thirty day period, and used his Complaint, and his Brief of Argument, to show the courts, why he desired to further his appeal. (Petitioner has attached hereto a copy of said Order).

Petitioner now, can factually state, that this Court erred in its findings, and instead of furthering-laying out grounds for this Court to reconsider its Order, Petitioner moves this Court, to transfer the action titled 79-507-B to the Court where appeal from District Court CR.NO.13950, was entertained under Court No. 63264 in the Supreme Court.

Petitioner reserves the right to amend and correct his Complaint in that the dismissal, by this Court was pre-mature, and the fact that the Defendants have not filed an Appearance, it would appear, from the courts, that the Complaint is in need of some corrections.

Petitioner comes before this Court with the informations set out herein and requests the propert court venue.

In the alternative, Petitioner requests leave to take an interlocutory appeal In Forma Pauperis to the United States Court of Appeals 8th Circuit from this Courts Order herein entered on November 5th, 1979.

Respectfully Submitted

/s/ _____
Russell Richard Dodson
P.O. Box B
Anamosa, Iowa 52205
PRO SE

Subscribed and sworn to before me this 13th day of Nov. 1979 at Anamosa, Iowa.

/s/ _____
Notary Public

THE STATUTE

42 U.S.C., Section 1983 -

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Consitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

THE CODE OF IOWA 1979

CH- 610; ATTORNEYS AND COUNSELORS - Provides definition in 610.15 deceit or collusion, an attorney and counselor, who is guilty of deceit or collusion or consents thereto, with intent to deceive a court or judge or a party to an action or proceeding is liable to be disbarred and shall forfeit to the injured party treble damages to be recovered in a civil action; Plaintiff contends that negligence is an intergal part of mal-practice;
Plaintiff contends that deceit and or collusion are integral parts of mal-practice;

Plaintiff contends that mal-practice is negligence, deceit and or collusion. Plaintiff further contends, that telling a person, you as being his counsel, are diligently at work, doing research to perfect the briefs for his appeal, but in reality are doing adverse, and to the contrary, are researching materials why this person should not have an appeal and at the same time are drawing up plans to terminate as counsel, and not telling this person the truth is clearly deceitful and actionable under 1983

Plaintiff by this show actions under state law for the courts to entertain as well as action under Federal Law, making pendent jurisdiction an alternative authority for the courts to be justified in entertaining this cause 79-507-B Ch- 610; further provides that -

Definition in 610.25 the proceedings to remove or suspend an attorney may be commenced,

by the direction of the court or on motion of any individual;

Plaintiff contends, he made that motion in his Complaint and deposed and stated the Complaint, is true and correct in content.

Ch-613 A 8. further provides that governing bodies of independent or autonomous board or asso.s, are liable under 42 U.S.C. 1983

Petitioner re-states that: Standard D of the Aldisert Report recommends:

If the court determines that the complaint is irreparably frivolous or malicious, it should be dismissed without affording the plaintiff an opportunity to amend. If the court determines that the complaint is frivolous or malicious, but that this defect can be cured by amendment, the court should issue an order to show why the complaint should not be dismissed. The order should explain why the complaint is frivolous or malicious and should allow

the plaintiff an opportunity to respond and amend the complaint. See Section II, En. 27 SUPRA

The Courts did not state the Complaint can not be repaired, the Court did not state it to be malicious, nor did this Court afford Plaintiff the opportunity to amend and such is held as reversable error.

The Courts noted in: Scheuer v. Rhodes, 416 U.S. 232 236, 94 S.Ct. 1683, 1686, 40 LEd. 2d 90, 96 (1974) that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitled him to relief. This language was quoted by the Court in Estell V Gamble,

Petitioner states that his Complaint, clearly stated that the Board of Supervisors authorizes Polk County Offender Advocates to act in the manner complained about from the ground rules they layed out, which

is actionable under 1893.

Petitioner states that his Complaint was authorized and pursuant to Civil Rights Act 1871 and consistent with 1983.

Petitioner re-states: The language of Sec. 1983 requires a degree of cau*sation as an element of individual liability, but it does not specifically require personal participation. The proper question is therefore whether the Complaint adquately alleges the requisite causal connection between the Supervisory Defendants' action and the deprivation of Plaintiffs rights. "Personal participation is only one of several theories which can be used to establish causation. Petitioner respectfully seeks knowing

Is it then: The courts opinion that the State of Iowa allows independent organizations; to operate, upon and under its jurisdictions within its districts of the counties, that our politicall sub-divided

into parts, and contained within the boundaries, that make up the State of Iowa; these organizations, establish in accordance with the standards of the State of Iowa; these organizations conduct in accordance, pursuant to the requirements of the State of Iowa; these organizations are compensated annually from the counties' budget these organizations are governed, regulated, and controlled, by the Board of Supervisors, whom are in turn appointed, up under color of state law, vested with duty and power, to conduct, respect, and operate within the same: And from this said not to be under color of state, when establishing an independent organization, that are not held to be acting within the scope of their duties, nor within or under color of state law, when an agent or asst. from one of these organizations are appointed by the

courts to represent a person, in a court of law, where such persons life or liberty may be at stake, and full protection that our constitution secures should be afforded, such persons are not protected by virtue of state law, in that the opinions upheld that guide the courts today, does not hold independent organizations, agents or, assistants liable, for any injury, damage, violation, or deprivation, that may come from their acts or negligence: as being contrary to the 14th Amendemnt, in making it law; in making it safe for independent individuals, employed by independent agencies, as agents, assistants, or instrumentallities thereof, to infringe and or abridge, by accident, incident, failure to protect, or neglect: upon the rights and privileges of any person: is clear denial of the equal protection of the laws of this State. If this is the opinion of the courts; Petitioners state that this is un-constitutional, prejudicially wrong and above all reversible

error.

And is it further, this Courts opinion, to say that if the Board of Supervisors, chose to establish an independent medical facility, expensed by the County, for the purpose of treating, indigent persons, and if such injury or damage from treatment, sustained death, permanent dis-figurement or loss of limb, and being the direct result of accident, incident, failure to properly care or provide, or mal-practice from neglect that persons are not acting under color of state law and can not be held liabile.

Petitioner notes, the Courts; "Establishing a public defender office is merely a means of administering the states obligation to provide counsel to indigent defendants in criminal causes."

Is it not also the States obligation to administer equal protection of the laws of this State?

Is it then, by this obligation, from

this obligation, in complience with, that such administration, is the direct authority in the State of Iowa that such requirement be enforced and provided; and such obligation was had from political stipulation, and making it a statute of this State, and such a statute combined with others to make up the laws of this State, and such laws are the color of this State, making such administration under and directly the same?

Is it not, that such obligation imposed upon the State, be in and under the same, enforced and provided by institution, organization, or agencies, regulated and controlled by the State?

Is it not contrary, that agencies, independent of the State of Iowa, uncontrolled or regulated by the State of Iowa, and not held to be acting under the colors of the State of Iowa, as well as error from inclination if such obligation of the State be administered thereby, and if such is found to be true,

would it not be authorized-although illegal-from ordinance, regulation, or custom of such usage within the jursidiction of the State of Iowa?

EXHIBIT OF EXPLANATION

Plaintiff-Petitioner, on the 9th of March 1979 was sentenced to a term of twenty five /25/ for first degree robbery, from a District Court jury verdict. On the same day, Petitioner was appointed Martha Shepard, to perfect the appeal from the noticed filed in this case cited as CR. NO 13950.

Petitioner, from March 9th 1979 until September 10th 1979 was under the impression, that his appeal briefs, were being researched and put together for filing the appeal and plans for agruments being drawn up.

Petitioner on September 10th 1979, receives in the mail, adverse to the above, a termination application pursuant to R.A.P. 104 requested by Ms. Shepard, including her

personal letter to Petitioner. And a form from the Courts, that states, that if Defendant, agrees with his attorney that his appeal is frivolous, mark the space so designated and the appeal will be dismissed... or if the appeal is not frivolous from the opinion of the Defendant, and he does not agree with his attorney, then the Defendant, shall set out grounds why his appeal is not frivolous and shold be further entertained in the Courts, and doing all this within thirty /30/ days after received.

Petitioner came before this Court and stated that, the Complaint in Civil Case No. 79-507-B is: -Quote- Defendant sets out the content of his Complaint as an Integral Part, in which the Courts can abstract as grounds to further an appeal in this case cited as 13950. - Unquote -.

Petitioner went further, in his Brief of Argument to Support an Appeal -(Which was clearly labelled-AS THE SAME)-and pointed

out more facts, that he wished to raise on appeal.

Petitioner contended that counsel was ineffective and incompetent, failed, neglected and above all deprived Plaintiff of his rights, and by doing so denied him due process of law, plain-contructed the 1983 action for the purpose to strongly support in-effective assistant of counsel and to further show with events that he was not provided a fair and impartial trial, a proper investigation, or any assistance that he requested, by the conduct of the collusion of office & agents. As instructed by the Courts, this was all done and sent to the Courts, within the thirty /30/ day period required, if he desired to further his appeal, his appeal should not have been dismissed and this is an error on this Courts part.

EXHIBIT OF EXPLANATION

Plaintiff-Petitioner states, in the event, that he was deprived of his right to appeal, by the deception practiced upon him by his counsel,, is entitled to present by motion to vacate and set aside his sentence, the errors ordinarily cognizable on appeal (See Plaintiff's Exhibit, titled the Statute, for Plaintiff's defenition of mal-practice-encompassing deceit as a factor and establishing negligence to further support the claim, herein attached) Also See - Desmond Vs U.S., C.A. Mass. 1964 333 F.2d 378, on remand 345 F.2d 225, 14 A.L.R. 3rd 718.....and Dansby Vs U.S. D.C.N.Y. 1968 291 F. Supp. 790.....as sole authoritys', as why Plaintiff pursuant, added the clause for the injunction to file such a motion that sought such relief.

Plaintiff-Petitioner respectfully states that if any amount of diligence was exercised, in researching the above cited

cases, the courts would have never entertained the injunctive relief as a habeas corpus proceeding. Contrary by doing so, the Court erred making it reversible error for remand.

Although, Plaintiff agrees with the Court, that he did not exhaust his state remedies, he points out, that his Complaint was a means for him to be afforded his state remedy of appeal, which was, and subsequently did, get taken away from him simply, Plaintiff was trying to convince this Court that the acts of his attorney was taking away his state remedies, and can not be held for not exhausting them when he was attempting to make claim for them.

Still further, the Complaint was filed in pro se and the Courts should have afforded more care in their inference, Plaintiff is not an attorney and this should have been weighed in full.

Again Petitioner agrees with the Court,

in that if the Complaint was structured for the purpose of what the Courts held it as being, then such dismissal was warranted. Petitioner Notes: That this Court said the Iowa Supreme Court granted the motion by counsel to terminate pursuant to Iowa R, ARP.P.104 and also dismissed Plaintiff's appeal, the Order by this Court was filed Nov. 5th, the Order by the Supreme Court was filed Nov. 9th which dismissed Plaintiff appeal, is there deception and conspiracy on the part of Justice Harold D. Vietor, and from this can Petitioner say that the consideration was biased and the dismissal prejudicial? Warranting discretionary review?

RULING ON MOTION,
AMENDMENT TO ORDER,
AND ORDERS
(Filed November 20, 1979,
in the United States District Court
for the Southern District of Iowa)
[Title omitted in printing]

Plaintiff's Motion to Reconsider Order or in Alternative, Motion for Leave to Take an Interlocuotry Appeal in Forma Pauperis is before the Court.

The motion to reconsider is overruled.

The Court erroneously gained the understanding from plaintiff's complaint that the Iowa Supreme Court had granted the motion of Ms. Shepard for permission to withdraw and to have the appeal dismissed as frivolous pursuant to Iowa R. App. P. 104. It appears from plaintiff's motion to reconsider order that the Iowa Supreme Court had not in fact acted on Ms. Shepard's motion at the time plaintiff submitted his complaint to this Court and at the time this Court entered its order of dismissal, November 5, 1979. It further appears from

plaintiff's motion to reconsider order that the Iowa Supreme Court did enter such an order on a later date, November 9, 1979. Therefore, the order of dismissal entered by this Court on November 5, 1979, is amended by striking therefrom the last sentence of the second paragraph, and by adding the following paragraph to footnote 1:

> On November 9, 1979, four days after this order of dismissal was filed, the Iowa Supreme Court granted the motion and dismissed plaintiff's appeal. (Nov. 20, 1979, amendment to order of dismissal.)

It further appears from plaintiff's motion to reconsider order that he understood and intended portions of his complaint and particularly the "Brief of Arguments to Support an Appeal" attached to his complaint to constitute a communication to the Iowa Supreme Court that he desired to proceed with his appeal pursuant to Iowa Rule of Appellate Procedure

104. In order to bring this matter to the attention of the Iowa Supreme Court, this Court telephonically advised the Chief Justice of the Iowa Supreme Court of this matter on November 15, 1979, and now orders the Clerk of this Court to forthwith forward to the Chief Justice of the Iowa Supreme Court a copy of this Court's file in this case.

IT IS ORDERED that plaintiff may proceed in forma pauperis to appeal this Court's order of dismissal to the United States Court of Appeals, and the plaintiff's alternative "Motion for Leave to Take an Interlocutory Appeal in Forma Pauperis" shall be treated as his notice of appeal.

Dated this 20th day of November, 1979.

HAROLD D. VIETOR
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1996 September Term, 1979

| | |
|---|---|
| Russell Richard Dodson, Appellant, vs. Polk County; Polk County Board of Supervisors; etc., et al, Appellees. | Appeal from the United States District Court for the Southern District of Iowa |

The Court will consider this appeal on the original files of the United States District Court in lieu of the designated record required by local Rule 11. The clerk of the United States District Court for the Southern District of Iowa is hereby requested to forward his original files in case Civ 79-507-B to this Court.

November 23, 1979

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1996 September Term, 1979

| | | |
|---|---|---|
| Russell Richard Dodson, | ) | |
| Appellant, | ) | Appeal from the United States District Court for the Southern District of Iowa |
| vs. | ) | |
| Polk County, et al, | ) | |
| Appellees. | ) | |

Appellant's pro se application for a stay of appeal pending state court proceedings is hereby denied.

On the Court's own motion Mr. Jack Hudson of the Iowa Bar is appointed to represent the appellant under the inherent power of the Court on the sole issue as to whether or not a Public Defender is subject to suit under the Civil Rights Act.

Appellant, pro se, may file a pro se brief on any other issue that he deems necessary.

February 4, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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No. 80-824

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

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ORDER ALLOWING CERTIORARI

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Filed March 2, 1981

The Petition herein for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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No. 80-824

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

---

ORDER

---

On consideration of the Motion of Respondent for Leave to Proceed in Forma Pauperis,

It is ordered by this Court that the said Motion be, and the same is hereby,

granted.

March 2, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

---

No. 80-824

---

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

ORDER

---

On consideration of the Motion for Appointment of Counsel,

It is ordered by this Court that the said Motion be, and the same is hereby, granted, and it is ordered that John D.

Hudson, Esquire, of Des Moines, Iowa, is appointed to serve as counsel for the Respondent in this case.

March 23, 1981

CERTIFICATE OF FILING

I, Thomas M. Werner, hereby certify that I filed the foregoing Joint Appendix by depoisting forty copies thereof in the United States mail on May 5, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543. The revised edition of the Joint Appendix was mailed to the Clerk on or before May 29, 1981.

Tom Werner

Thomas M. Werner
Assistant Polk County Att.
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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Thomas M. Werner, hereby certify that on the 5th day of May, 1981, three copies of the Joint Appendix were mailed, postage prepaid, to John D. Hudson, 510 Fleming Building, Des Moines, Iowa, Counsel for the Respondent. The revised edi-

tion of the Joint Appendix was mailed to Mr. Hudson on or before May 29, 1981. I further certify that all parties required to be served have been served.

Tom Werner

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ATTORNEY FOR PETITIONERS

No. 80-824

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

v.

RUSSELL RICHARD DODSON,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

---

# BRIEF OF RESPONDENT IN OPPOSITION

---

John D. Hudson
Attorney for Respondent

510 Fleming Building
Des Moines, Iowa 50309
(515) 282-6803

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

No. 80-824

POLK COUNTY: POLK COUNTY BOARD OF SUPERVISORS: POLK COUNTY OFFENDER ADVOCATE: and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

v.

RUSSELL RICHARD DODSON

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

# BRIEF OF RESPONDENT IN OPPOSIGION

---

## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit erred in holding that a County employed Public Defender acts under color of State law in representing indigent defendants and is subject to suit under 42 U.S.C. §1983.

2. Whether the Court of Appeals for the Eighth Circuit erred in holding that in suits brought under 42 U.S.C. §1983, the County employed Public Defender enjoys a qualified immunity for actions taken while representing indigent clients.

## OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-29) is reported at 628 F.2d 1104. The opinion of the United States District Court for the Southern District of Iowa is reported at 483 F. Supp. 347, and is reproduced in Petitioner's Appendix B, 1-12.

## JURISDICTION

The judgment and opinion of the Court of Appeals for the Eighth Circuit was entered on August 26, 1980, and the Petition for Certiorari was filed within ninety days of that date. The

Court's jurisdiction is invoked under 28 U.S.C. §1343(3).

## STATEMENT OF THE CASE

The Respondent filed a Pro Se Complaint in the United States District Court for the Southern District of Iowa, alleging that Martha Shepard, an attorney in the Polk County Offender Advocate's Office, failed to adequately represent him in an appeal to the Iowa Supreme Court of a robbery conviction. The Complaint alleged that Dodson had been convicted of robbery in the Iowa State Court and that Ms. Shepard was appointed to represent him on Appeal. She later moved to withdraw as counsel and to have the Appeal dismissed as frivolous, pursuant to Iowa Rule App. P. 104. The Respondent alleged that Ms. Shepard's actions deprived him his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his State-created right to appeal, in violation of the due process clause of the 14th Amendment. The Complaint set out pendent claims for malpractice and breach of an oral contract to prosecute the Appeal.

The Polk County Offender Advocate and the Polk County Board of Supervisors, also named as Defendants, were alleged to be responsible for Ms. Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals. The Complaint sought both injunctive relief and monetary damages.

The District Court, the Honorable Harold D. Vietor presiding, dismissed the Petition for lack of State action. The claims against Polk County and its Board of Supervisors were dismissed because, in the opinion of the District Court, the Complaint failed to allege the requisite personal involvement with unconstitutional conduct. The pendent State claims were dismissed as well.

Respondent filed a timely Notice of Appeal, and counsel was appointed to represent him and address the issue of whether or not a Public Defender is subject to suit under 42 U.S.C. §1983.

The Eighth Circuit Court of Appeals reversed the decision of the District Court and held that an attorney in a County or State funded Public Defender's office acts under color of State law in representing indigent defendants. The Circuit Court also held that the Public Defender enjoys a qualified immunity from liability and that the Complaint alleged sufficient State action against the Polk County Board of Supervisors so as to meet the jurisdictional requirements of §1983. The Circuit Court further held that the Complaint did not sufficiently allege the necessary involvement of Polk County and dismissed the action as to Polk County, noting that Respondent should be given opportunity to amend his Complaint. The denied prayer for injunctive relief was affirmed, as the Court found it to be in the nature of habeas corpus, and it was conceded that State remedies had not been exhausted.

ARGUMENT

Respondent cannot deny that there is a considerable split of authority in the Courts of Appeal, as recited in Petitioner's Brief. Respondent, however, submits that the decision of the Court of Apeals is the first time the issue of Public Offender immunity was addressed by an Appellate Court following this Court's decision in Ferri v. Ackermann, 444 U.S. 193 (1979). Ferri held that an attorney appointed by a Federal Court to represent an indigent defendant is not entitled to absolute immunity as a matter of Federal law. Clearly, the role of appointed counsel is similar to that of the State-financed Public Defender, and in light of this Court's decision in Ferri, the opinion of the Appeals Court is mandated on this point.

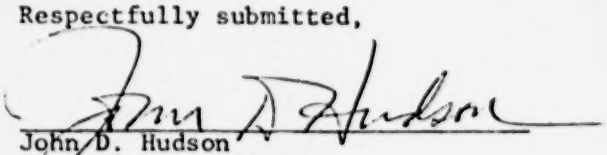
On the issue of whether the Public Defender acts under "color of State law" in representing indigent defendants, there is clear authority in support of the Appeals Court decision. See Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (per curiam). The opinion of the Court below accurately comports with contemporary

standards of State action and was properly decided. A useful discussion of this issue is found in Note, "Liability of Public Defenders Under Section 1983," 92 Harvard Law Review 943 (1979).

## CONCLUSION

For the reasons advanced in this argument and those in the opinion of the Court below, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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Telephone: (515) 282-6803
ATTORNEY FOR RESPONDENT

## CERTIFICATE OF FILING

I, John D. Hudson, hereby certify that I will file the foregoing Brief of Respondent in Opposition by depositing ten copies thereof in the United States Mail on February 6, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543.

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## CERTIFICATE OF SERVICE

I, John D. Hudson, hereby certify that on the 6th day of February, 1981, three copies of the Brief of Respondent in Opposition were mailed, postage prepaid, to each of the following persons at their respective addresses:

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NO. 80-824

IN THE SUPREME COURT OF THE

UNITED STATES

RECEIVED
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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

v.

RUSSELL RICHARD DODSON,

Respondent

---

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW the Respondent, Russell Richard Dodson, and pursuant to Supreme Court Rule 46(1), moves the Court for leave to Proceed In forma Pauperis. Petitioner states that leave to Proceed In Forma Pauperis was granted by the Eighth Circuit Court of Appeals.

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## CERTIFICATE OF FILING

I, John D. Hudson, hereby certify that I will file the foregoing Motion to Proceed In Forma Pauperis by depositing five copies thereof in the United States Mail on February 6, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543.

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## CERTIFICATE OF SERVICE

I, John D. Hudson, hereby certify that on the 6th day of February, 1981, two copies of the Motion to Proceed In Forma Pauperis were mailed, postage prepaid, to each of the following persons at their respective addresses:

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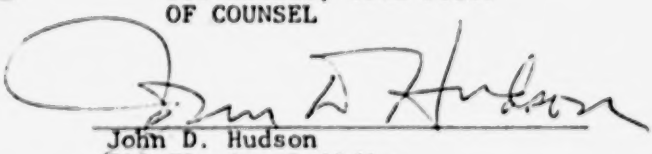

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No. 80 - 824

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In The

# Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

*VS.*

RUSSELL RICHARD DODSON,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR THE PETITIONERS

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*ATTORNEYS FOR PETITIONERS*

Polk County Department of General Services, *Printing Division*, 2nd and Court Aves., Des Moines, Iowa 50309

## QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. §1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. §1983 for actions taken while representing such indigent clients.

## TOPICAL INDEX


| | Page |
|---|---|
| Opinions Below . . . . . | 1 |
| Jurisdiction . . . . . | 2 |
| Statute Involved . . . . . | 3 |
| Statement of Case . . . . . | 3 |
| Summary of Argument . . . . . | 10 |
| Argument . . . . . | 29 |
| I. The Ferri Opinion, the Great Weight of Federal Case Law, and the Fact that their Responsibilities Parallel those of Privately Retained Defense Counsel Support a Decision that Public Defenders do not Act Under Color of State Law for the Purposes of 42 U.S.C. §1983 . . . . . | 29 |
| A. Government Sponsored Public Defenders do not Act Under Color of State Law in Representing Indigent Defendants Since their Responsibilities Parallel those of Privately Retained Defense Counsel; They Act Independently of Governmental Control in Representing Indigent Clients, Owe their Loyalty Solely to the Client, and are Free to Perform Their Functions in Essentially the Same Manner as if Privately Retained . . . . | 30 |

Index

Page

B. The Fact that there is State Funding and State Involvement in the Polk County Offender Advocate Program does not Compel a Finding that the Attorneys Employed in the Office Act Under Color of State Law; Payment by the State does not Endow Public Defenders with any Powers not already possessed by their Virtue of being Licensed to Practice Law . . . . . 40

C. The Great Weight of Case Law Supports the View that Public Defenders do not Act Under Color of State Law in Representing Indigent Defendants . . . . . 46

D. The Supreme Court's Recent Decision in Ferri v. Ackerman Holds Firmly to the View that Appointed Attorneys should be Subject to Exactly the Same Liabilities that Privately Retained Attorneys Face; Since Private Lawyers are not Liable in a 1983 Action because they do not Act under Color of State Law, a Logical Extension of Ferri Compels the Conclusion that Public Defenders also are not "State

Index

Page

Actors" so as to be Liable under §1983 . . . . 54

II. The Common Law, the Public Interest, and the Available Alternatives to §1983 Liability Support a Decision that Public Defenders are Absolutely Immune from Suit under 42 U.S.C. §1983 . . . . 64

A. The Common Law Absolute Privilege for Counsel in Defamation Suits Compels a Similar Absolute Immunity for Public Defenders from Actions under 42 U.S.C. §1983 . . . . . 65

B. The Public Policy Interests Underlying the Immunity Doctrine and the Criminal Justice System Support a Grant of Absolute Immunity to Public Defenders from Actions under 42 U.S.C. §1983 . . . . . 73

1. The Interest in Encouraging Public Defenders to Fearlessly Discharge their Duties to Indigent Clients Supports a Rule of Absolute Immunity . . . . . 73

2. The Public Interest in Encouraging Able Lawyers to Assume Public Defender Roles

Index

Page

Supports the Principle of Absolute Immunity under Section 1983 for such Defenders . . . . . 80

3. The Public Interest Compels a Grant of Absolute Immunity so that the Interests of Public Defenders are not Diverted from their Important Public Function of Representing Indigent Defendants . . . . . 84

4. The Public Interest Supports a Grant of Absolute Immunity to Public Defenders, since the Fear of §1983 Liability Might Dissuade Defenders from Revealing Weaknesses in the Case or Confessing Error for a New Trial . . . . . 90

5. The Public Interest Supports a Rule of Absolute Immunity for Public Defenders under §1983, since anything Less would Involve a Form of Collateral Attack on a Criminal Judgment and would Create Uncertainties and Complications in the Criminal Justice System . . . . . 93

Index

Page

6. The Doctrine of Absolute Immunity for Public Defenders Promotes Legitimate and Substantial Governmental Interests . . . 95

C. The Availability of Alternative Sanctions and Restraints Supports a Finding of Absolute Immunity for Public Defenders under 42 U.S.C. §1983 . . . . . 97

D. The same Fundamental Premise which Underlies the Policies Supporting Absolute Immunity for Judges, Prosecutors, and Other Officials also Supports a Grant of Absolute Immunity for Public Defenders . . . . 101

E. Available Alternatives to §1983 Liability for Public Defenders Provide Superior Methods for Ensuring an Indigent Defendant the Right to Effective Assistance of Counsel . . . . . 104

Conclusion . . . . . 110

Appendix A (Chapter 336A of the Iowa Code, the Iowa Public Defender Act ) . . . . . 1A

Index Page

Argensinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 . . . . . 86

Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973) . . . . . 48

Barr v. Matteo, 360 U.S. 564 (1959) . . . . . 76, 88

Bradley v. Fisher, 80 U.S. (913 Wall) 335, 20 L.Ed. 646 (1872). 55, 92

Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) . . . . . 22, 27, 35, 47, 51, 78, 82, 95, 104, 109

Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970) . . . . . 69

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). . 42

Butz v. Economou, 438 U.S. 478 (1978). . . . . 21, 27, 69

Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969) . . . . . 69

Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972) . . . . . 12, 35, 47

Ferri v. Ackerman, 44 U.S. 1983 (1979) . . . . . 16, 17, 30, 54-64

Florida Bar v. Dingle, 220 S.2d 9 (Fla. 1969) . . . . . 99

French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) . . . . . 48

Friedman v. Younger, 282 F.Supp. 710 (C.D. Cal. 1968) . . . . . 69

Index

Page

Gideon v. Wainwright, 372 U.S. 335 (1963) . . . . . 10

Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949) . . . . . 76

Haines v. Kerner, 404 U.S. 519 (1972) . . . . . 87

Imbler v. Pachtman, 424 U.S. 409 (1975) . . . . . 20, 25, 26, 79, 89, 93, 103, 105, 108, 109

In Re Hough, 24 Cal.2d 522 (1944) . . . . . 34

In Re Martin, 30 App. Div.2d 361, 22 N.Y. Supp.2d 328 (1968). 99

In Re McDermit, 86 N.J. 17, 114 A. 144 (1921) . . . . . 99

John v. Hurt, 489 F.2d 786 (7th Cir. 1973) . . . . . 24, 81

Johnson v. Kreider, 246 F.Supp. 188 (M.D. Pa. 1967) . . . . . 48

Kissell v. Breskow, 579 F.2d 425 (7th Cir. 1978) . . . . . 70

Martin v. Hall, 20 Cal. App.3d 414, 97 Cal. Rptr. 730 (1971). . 77

Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977) . . . . . 22, 47, 86

Minns v. Paul, 542 F.2d 899 (4th Cir. 1976) . . . . . 12, 24, 77, 79, 81, 85, 95, 96, 106

Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) . . . . . 32, 40

Index

Page

Morgan v. Sylvester, 125 F.Supp. 380 (S.D. N.Y. 1954), affirmed 220 F.2d 758 (2nd Cir.) . . . . 96, 97

Morrow v. Igleburger, 67 F.R.D. 625 (S.D. Ohio 1974). . . . . 69

Muenster v. Lamb, 11 Q.B.D. 588, 607 Ca. (1883) . . . . . 89

Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968) . . . . . 48

Nelson v. Stratten, 469 F.2d 1155 (5th Cir. 1972) . . . . . 48

O'Shea v. Littleton, 414 U.S. 488 (1974) . . . . . 100

Page v. Sharpe, 478 F.2d 567 (1st Cir. 1973) . . . . . 48

Peake v. County of Philadelphia, 280 F.Supp. 853 (E.D. Pa. 1968) .41, 47

Philips v. Rockefeller, 321 F.Supp. 516 (S.D. N.Y. 1970), affirmed 435 F.2d 976 . . . . . 44

Phillips v. Singletary, 350 F. Supp. 297 (D.S.C. 1972) . . . . . 49

Pierson v. Ray, 386 U.S. 547 (1967) . . . . . 73

Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) . . . . . 44

Pritt v. Johnson, 264 F.Supp. 167 (N.D. Pa. 1967) . . . . . 69

Roberts v. Barbosa, 227 F.Supp. 167 (S.D. Cal. 1964) . . . . . 85

Index

Page

Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) . . . . . 70

Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) . 25, 82, 100, 107

Rondel v. Worsley, 1 A.C. 191 (1969). . . . . 19, 66, 89, 94 , 95

Sanchez v. Murphy, 385 F.Supp. 1362 (D. Nev. 1974) . . . . . 52

Scott v. Stansfield, L.R. 3 Ex. 220 (1968). . . . . 73

Shelton v. Randolph, 373 F.Supp. 448 (W.D. Va. 1974) . . . . . 48

Skipper v. Brummer, 598 F.2d 1256 (5th Cir. 1978) . . . . . 47

Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978) . . . . . 33

Spring v. Constantino, 168 Conn. 299, 362 A.2d 871 (1975) 14, 32, 36, 37

Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969) . . . . . 69

Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972) . . . . . 48

Thomas v. Howard, 455 F.2d 228 (3rd Cir. 1972) . . . . . 48

Turpen v. Booth, 56 Cal. 65 (1880) . . . . . 69

United States v. Smith, 436 F.2d 1130 (9th Cir. 1970) . . . . . 99

Index Page

United States v. Tate, 419 F.2d 131 (6th Cir. 1969) . . . . . 37

United States ex rel. McClaughlin v. New York, 356 F.Supp. 988 (E.D. N.Y. 1973). . . . . 14, 53

United States ex rel. Wood v. Blacker, 335 F.Supp. 43 (D.N.J. 1971) . . . . . 16, 36, 43, 46, 47

Vance v. Robinson, 292 F.Supp. 786 (W.D. N.C. 1968). . . . 32, 41, 49

Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973) . . . . . 70, 86, 102

Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926) . . . . . 66

Statutes

Iowa Code

Section 336A . . . . . 3

Iowa Rule of Appellate Procedure 104 . . . . . 5

United States Code

18 U.S.C. Section 242 . . . . . 99

28 U.S.C. Section 1343(3). . . 2, 3, 7

42 U.S.C. Section 1983 . . . . passim

18 U.S.C. Section 3006A (1976) .55, 62

Index

Page

Texts and Reports

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (1971) . . . 14, 76, 83, 102

American Bar Association Project of Standards for Criminal Justice, Standards Relating to Defense Services (1968). . . . 38

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Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 N.L.A.D.A. Brief Case 106 (1977). . . . . 83

Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 1 (1969) . . . . . 15, 33

Mallen, The Court Appointed Lawyer and Legal Malpractice - Liability or Immunity, 14 American Criminal Law Quarterly 59 (1976) . . . . . 43

Nakles, Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability, 81 Dickinson L.Rev. 229 . . . . . 11

Note, Work Overload and Defender Burnout, 35 N.L.A.D.A. Briefcase 5 (1977) . . . . . 87

Index

Page

Prosser, Handbook on the Law of Torts (4th Ed. 1971) . . . . . 66

Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Columbia L.Rev. 463 (1909) . . 67, 68

Miscellaneous

Canon 7, American Bar Association Code of Professional Responsibility (1970) . . . . . 98

3 Restatement of Torts §682, Comment h . . . . . 68

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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NO. 80-824

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; AND MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

---

# BRIEF FOR THE PETITIONERS

---

## OPINIONS BELOW

The Order of the United States District Court for the Southern District of Iowa, Central Division, of November 5, 1979 (Civil No. 79-507-B) dismissing Mr. Dodson's action is reported at 483 F.Supp. 347, and is found in Appendix "B" to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Eighth Circuit

affirming in part and reversing in part the District Court's judgment was filed on August 26, 1980, is reported at 628 F.2d 1104, and is found in Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

This action was filed in the United States District Court for the Southern District of Iowa, Central Division, on November 5, 1979, asserting claims under 42 U.S.C. §1983 and implicitly invoking federal jurisdiction under 28 U.S.C. §1343. (Joint App., pp. 4-23). The District Court dismissed the action the same day, and Mr. Dodson filed a timely Notice of Appeal with the Eighth Circuit Court of Appeals on November 23, 1979. (Joint App., p. 47). The Court of Appeals entered its judgment affirming in part and reversing in part the District Court's opinion on August 26, 1980. (Petition for Cert., App. A). Polk County and its agents filed their Petition with this

Court for a Writ of Certiorari on November 21, 1980, alleging grounds specified in Supreme Court Rule 17.1, including a conflict among decisions of various circuits of the Courts of Appeals. This Court granted certiorari on March 2, 1981 (Joint App., p. 49), exercising its jurisdiction under 28 U.S.C. §1343(3).

## STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdicition thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF CASE

Chapter 336A of the Code of Iowa (1981) (App. A to Brief) gives to Iowa

counties the option of creating a public defender's office for the purpose of representing in criminal actions any defendant who is determined to be without adequate funds to employ an attorney. The public defender is appointed by the provision that the office be filled by the county board of supervisors upon recommendation by the district court judges of the judicial district containing the county the defender is to serve. In Polk County, the attorney's salary and the operating expenses of the Polk County Offender Advocate's Office are paid out of the County's general funds, and the County also furnishes office space and furniture for the program. The Polk County Offender Advocate Office employs nine lawyers, seven of whom represent only criminal defendants, and two who represent juveniles. The office's case load is approximately 2,500 cases per year, split evenly among the above-mentioned

seven defenders. The assistant public defenders are appointed by the public defender in the manner prescribed by the County Board of Supervisors, and their compensation is determined by the Board of Supervisors.

On February 1, 1979, the Respondent herein, Russell Richard Dodson, was convicted in Polk County District Court of First Degree Robbery and was subsequently sentenced to a term of 25 years in prison. On the same day, Martha Shepard of the Polk County Offender Advocate's Office, two of the Petitioners in this action, was appointed to represent Mr. Dodson in the appeal of his conviction to the Iowa Supreme Court. After scrutinizing Mr. Dodson's claim, Mrs. Shepard decided that there were no grounds to warrant reversal of his conviction, and moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous. Iowa Rule of Appellate Procedure 104 provides for

the dismissal of appeals found by the Iowa Supreme Court to be "wholly frivolous". The Motion to Withdraw was subsequently granted by the Iowa Supreme Court, and the appeal was dismissed.

Thereafter, on November 5, 1979, Mr. Dodson filed a pro se complaint in the United States District Court for the Southern District of Iowa, alleging that Mrs. Shepard failed to adequately represent him in his appeal to the Iowa Supreme Court of his robbery conviction. The lawsuit claimed that Mrs. Shepard's actions had deprived Dodson of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause of the Fourteenth Amendment. In addition, Mr. Dodson asserted claims for malpractice and breach of oral contract to prosecute the appeal.

The above-described action was brought under 42 U.S.C. §1983, and federal jurisdiction was invoked pursuant to 28 U.S.C. §1343(3). In addition to Mrs. Shepard, the Complaint named the Polk County Offender Advocate and the Polk County Board of Supervisors as defendants, alleging that they were responsible for Mrs. Shepard's actions since they had established rules and procedures for her to follow in handling criminal appeals. Mr. Dodson further alleged by implication that the above-named parties were engaged in a conspiracy to deny him and other individuals similarly situated their rights to due process of law, the effective assistance of counsel, and equal protection under the law. The Complaint sought injunctive relief, monetary damages, and relief from confinement.

On November 5, 1979, the District

Court[1] dismissed the claims against Mrs. Shepard and the Polk County Offender Advocate for lack of "state action", a prerequisite to an action under 42 U.S.C. §1983. (Petition for Certiorari, App. "B", p. 11). The claims against the Polk County Board of Supervisors were also dismissed because, in the District Court's opinion, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. (Petition for Certiorari, App. "B", p. 11). After disposing of all the constitutional claims, the District Court then dismissed the pendent state claims as well. (Petition for Certiorari, App. "B", p. 12). Mr. Dodson then filed a Motion to Reconsider, or in the Alternative, a Motion for Leave to take an Interlocutory Appeal. (Joint App., p. 24). The District Court over-

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[1] The United States District Court for the Southern District of Iowa, the Honorable Harold D. Vietor presiding.

ruled the Motion to Reconsider, and ordered that Dodson could proceed in forma pauperis to appeal the Court's Order of dismissal. (Joint App., p. 44).

On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. John D. Hudson was appointed to represent Dodson and to address the sole issue of whether or not a public defender is subject to suit under 42 U.S.C. §1983. (Joint App., p. 48). Briefs were filed, oral argument was presented, and on August 26, 1980, the Eighth Circuit, after recognizing the considerable split in authority among the federal courts entertaining this issue, reversed the decision of the District Court and ruled that a county-employed public defender does act under color of state law in representing indigent defendants and enjoys only a qualified

immunity from liability.[2] (Petition for Certiorari, App. "A", p. 2).

On November 21, 1980, Polk County and its agents filed their Petition with this Court for a Writ of Certiorari alleging a conflict among the decisions of the various circuits of the courts of appeals. On March 2, 1981, the Petition was granted and on March 23, 1981, John D. Hudson was again appointed to represent Mr. Dodson in the proceedings before the Supreme Court. (Joint App., p. 52).

## SUMMARY OF ARGUMENT

Beginning with Gideon v. Wainwright, 372 U.S. 335 (1963), a line of constitutional cases has assured counsel to

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[2] Judge Overton of the U.S. District Court for the Eastern District of Arkansas, sitting by designation, dissented from the opinion of the other two members of the Eighth Circuit panel. (Pet. for Cert., App. A, pp. 20-29). Judge Overton argued that: (i) all but one circuit considering the question have concluded that public defenders do not act under color of state law; and (ii) public defenders must enjoy the same immunity from suit as that of the prosecutor announced in Imbler v. Pachtman, 424 U.S. 409 (1975).

virtually all indigent criminal defendants. Various schemes for meeting these mandates have been utilized. The most common methods are assigned counsel from the private bar, legal assistance from organizations financed by a combination of public and private funds, and part-time or full-time public defenders. With the advent of such systems, the quality of criminal defense has improved to the point where some contend that an indigent defendant gets better representation than one who can afford a lawyer. Nakles, Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability, 81 Dickinson L.Rev. 229. Nonetheless, more and more indigent defendants are suing their defense lawyers for money damages to compensate for alleged mistakes made in the course of a criminal defense. The overwhelming majority of such actions have been instituted in federal court

under the Civil Rights Act of 1871, 42 U.S.C. §1983.

Nonetheless, to date no §1983 suit against a public defender alleging a violation of the constitutional right to counsel has progressed beyond the pleading stage. The courts have universally refused to reach the merits for one of two reasons. Some courts have been adamant that there is no cause of action because, contrary to the requirements of §1983, the public defender's conduct does not constitute state action. Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). As an additional rationale, some courts have held that even if public defenders act under color of state law for the purposes of §1983 jurisdiction, public policy dictates that they be absolutely immune from §1983 suits. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). The Supreme Court has not yet authoritatively spoken on either issue.

I

The reason most frequently cited in support of dismissal of §1983 actions against public defenders is that they do not act under color of state law, a jurisdictional prerequisite to such actions. The Eighth Circuit Court of Appeals below erroneously believed that the fact that all of Polk County's public defenders are selected, paid, hired, and fired by the county was sufficient to find them "state actors" for the purposes of §1983. The Eighth Circuit's ruling should be reversed for the following reasons:

The public defender does not act under color of state law because he has an overriding duty to protect his client's interest and, hence, is not controlled by the state. This view rests on the premise that the public defender's role is analagous to that of the private criminal defense attorney, who is not a state

actor for §1983 purposes. The fact that an attorney is a public defender appointed by the court is not in itself sufficient to bring the defender's actions within the purview of state action, because neither the court nor the state has any significant control over the attorney-client relationship. United States ex rel. Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976). Indeed, American Bar Association standards underscore the fact that appointed counsel must be as free from judicial and political interference as privately retained counsel. American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function (1971), at §3.9. Some courts have likened the public defender's status to that of an independent contractor, stating that the attorney-client relationship is of a nature that precludes outside interference by the government. Spring v. Constantino,

168 Conn. 563, 362 A.2d 871 (1975). The function of a public defender, once assigned to a case, is the same as that of a privately retained defense counsel; he has exactly the same duties, burdens, and responsibilities as the highly paid, retained in advance criminal defense lawyer. Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 1, at 6 (1969).

Public defenders appointed pursuant to state statute or local authorization do not, simply by virtue of governmental compensation, become officers of the state. The mere fact that there is state funding and state involvement in a program does not automatically expose the program's actors to §1983 liability. It is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations. Furthermore, payment by the state does

not endow the public defender with any powers not already possessed by virtue of being licensed to practice law in the state. United States ex rel. Wood v. Blacker, 335 F.Supp. 43 (D.N.J. 1971). Except for the fact that public defenders are compensated by the government, nothing about their activity, or the effect thereof, is in any way dependent upon, or enhanced by, any state power or authority vested in them.

Moreover, this Court's recent decision in Ferri v. Ackerman, 444 U.S. 193 (1979), supports the conclusion that public defenders do not act under color of state law. In that case, this court ruled that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by a former client. The outstanding mandate of the

decision is the court's position that appointed defense counselors are as private and independent of governmental control as retained lawyers, and should be subject to exactly the same liabilities as retained counsel. Following this position, a logical extension of Ferri is that since privately retained lawyers are not liable under §1983 because they do not act under color of state law, public defenders should also be free from liability under the Civil Rights Act since they are not "state actors". Since the burdens and responsibilities of retained counsel and court-appointed defenders are identical in all respects, both should be found not to act under color of state law for the purposes of §1983 litigation.

II

A second reason for dismissing §1983 claims against public defenders is that they are as immune in criminal cases as

judicial officers are from civil liability. The Eighth Circuit compounded its erroneous decision on the color of state law issue by ruling that public defenders are entitled to only a qualified immunity from §1983 litigation. The lower court evidently believed that the grant of such a qualified immunity was an adequate compromise between the interests of public defender offices on the one hand, and the public interest in providing relief to indigent defendants whose constitutional rights have been violated. For the reasons discussed hereafter, the Eighth Circuit's ruling granting only a qualified immunity to public defenders must be reversed, and this court should find that public defenders are absolutely immune from actions brought under 42 U.S.C. §1983.

Initially, it should be noted that a historical study of the immunity doctrine at common law compels a conclusion that

all government subsidized defense counsel are absolutely immune from liability under §1983. In both the United States and England, the law of defamation has long protected both prosecutors and defense lawyers from suit for any statements made in the courtroom or in briefs and pleadings so as to prevent litigants from weighing all decisions in terms of potential liability. Indeed, in England barristers have been granted absolute immunity from suit in order to encourage them to litigate fearlessly and independently, to accept any client seeking their services, and to avoid retrying of issues. Rondel v. Worsley, 1 A.C. 191 (1969). Implicit in such a policy is the understanding that in certain occasions it is indispensable to the public interest that persons speak fearlessly and independently, uninfluenced by the fear of being brought to account in a civil damages action. This doctrine of absolute immun-

ity has been applied to virtually all other participants who fulfill an important function in the judicial process, including prosecutors, judges, grand jurors, court clerks, and court reporters.

In addition, various considerations of public policy dictate a finding that public defenders must be absolutely immune from §1983 liability. The very function of such counsel, like that of judges and prosecutors, often invites a common law tort action. Imbler v. Pachtman, 424 U.S. 409 (1976). Indeed, the practical realities surrounding the function of public defenders are wholly dissimilar, for purposes of immunity, from the circumstances of privately retained counsel. Because of such factors as their inability to choose or discharge their counsel, indigent defendants often view government-sponsored defense counsel with suspicion, and tend to perceive them

as representatives of the state. In addition, privately retained lawyers operate without certain financial and other pressures faced by public defenders and possess important economic and other influence with clients that their publicly supported courterparts lack. Thus, regardless of the quality of legal services rendered by such public defenders, the often inevitable result is bitterness towards the government-sponsored attorney and frequent civil suits and petitions for habeas corpus and other collateral relief. Just as the role of the prosecutor and the judge is likely to produce "with some frequency retaliatory suits by angry defendants," Butz v. Economou, 438 U.S. 478 (1978), so would the abrogation of the immunity doctrine in fact lead to tremendous pressures on court-appointed public defenders.

The interests of indigent criminal defendants are served better by a contin-

ued application of the doctrine of absolute immunity than by obtaining the highly speculative benefits of a §1983 remedy. Abrogation of the absolute immunity doctrine would harm defendants by inhibiting the exercise of the public defender's independent judgment as to such matters in the conduct of litigation as the making of pre- and post-trial motions, and the examination and cross-examination of witnesses. Indeed, some courts have justified a grant of absolute immunity to defenders so that they may vigorously assert the interests of their clients without their efforts being chilled by fear of lawsuits. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972). Moreover, without a grant of absolute immunity, the energies of public defenders would be diverted from their public function of representing their clients by the need to defend and guard against §1983 actions. Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977).

Additionally, as a practical matter, abrogation of the doctrine of absolute immunity would make post-trial review of convictions less effective in many cases, since the fear of §1983 liability would be likely to dissuade public defenders from acknowledging after trial their own mistakes or the errors of other attorneys on those occasions where necessary to support defendants' appeals or petitions for review. Most certainly, there would be a conflict between the public defender's duty to fully represent his client's interest by revealing flaws in his case, and his interest in protecting himself from civil liability.

Other interests of the public and the criminal justice system also call for a grant of absolute immunity to public defenders. It is increasingly difficult today to encourage able attorneys to accept positions with public defender offices, which offer far lower compensa-

tion than is available to privately retained defense counsel. The imposition of §1983 liability on such defenders would add further burdens and costs on attorneys seeking to perform a public service by representing indigents, and would deter many qualified lawyers from accepting such positions. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). Such a reluctance on the part of attorneys to serve as public defenders could have the very serious effect of jeopardizing the indigent defendants' Sixth Amendment right to effective assistance of counsel. John v. Hurt, 489 F.2d 786 (7th Cir. 1973). Moreover, abrogating the doctrine of absolute immunity would harm the public by making it impossible for defenders to exercise their best professional judgment in an effort to utilize efficiently the limited resources of the criminal justice system and to fulfill their ethical obligations. As with respect to prosecutors,

the abrogation of absolute immunity would create the threat that the publicly supported defense attorney "would shade his decisions instead of exercising the independence of judgment required by his public trust". Imbler v. Pachtman, 424 U.S. 409 (1976).

Absent §1983 liability for public defenders, complete and sufficient remedies exist today through collateral review procedures, as well as judicial and professional discipline and supervision, to insure that indigent defendants receive their right to effective assistance of counsel. Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). In fact, the abrogation of absolute immunity would significantly interfere with these remedies, and would substitute in their place an alternative, §1983 liability, which is of questionable effectiveness. Indeed, the allowance of a §1983 suit against such defenders would involve a form of

collateral attack on a criminal judgment, and would create great uncertainties and complications in the criminal justice system.

The policy considerations which result in absolute immunity for judges and prosecutors are equally applicable to public defenders. Since the judge, the prosecutor, and the public defender are considered a tripartite entity operating for the efficient administration of justice, it is crucial that each have the independence of judgment necessary to serve the public interest. As the Supreme Court itself has pointed out, "attaining the system's goal of determining guilt or innocence requires that both the prosecutor and the defense have wide discretion in the conduct of the trial and the presentation of evidence." Imbler v. Pachtman, 424 U.S. 409 (1976). Obviously, the very reasons advanced to assert that the public defender acts under color of

state law because of the favorable comparison of his activities with those of the prosecutor, also support an argument in favor of the public defender on the issue of absolute immunity. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972).

As seen, an analysis of the common law, public policy, and the great weight of federal case law demonstrates that the Eighth Circuit's decision granting public defenders only a qualified immunity is incorrect and must be reversed. This Court should reaffirm that absolute immunity is appropriate "to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz v. Economou, 438 U.S. 478 (1978). Public defenders must be given absolute immunity from civil liability for damages under 42 U.S.C. §1983.

The matter at hand, then, presents a paradoxical either-or situation. If, on the one hand, the Court is of the opinion that the public defender's office is essentially the same as that of privately retained defense counsel, it should find that the defender does not act under color of state law for the purposes of 42 U.S.C. §1983. On the other hand, if the Court feels that the status of the public defender is not akin to that of retained counsel, but is rather like that of state officials such as judges and prosecutors, it should grant the defender absolute immunity under §1983 for the same reasons that those officials have been allowed immunity. These two arguments are certainly inconsistent with each other. Yet, it is imperative that the Court accept one of them; to hold that the public defender is subject to suit under §1983, while absolving from such liability all other participants in the

judicial process, including judges, prosecutors, court-appointed counsel, and privately retained attorneys, would be to invite dissatisfied clients to initiate a multiplicity of suits based upon fancied wrongs. The resultant harm would fall on society and the defendant himself.

## ARGUMENT

### I

### THE FERRI OPINION, THE GEAT WEIGHT OF FEDERAL CASE LAW, AND THE FACT THAT THEIR RESPONSIBILITIES PARALLEL THOSE OF PRIVATELY RETAINED DEFENSE COUNSEL SUPPORT A DECISION THAT PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. §1983.

To bring suit under 42 U.S.C. §1983, a plaintiff must establish two things: That he has been deprived of a right protected by the constitution, and that the deprivation occurred "under color of state law". Federal courts uniformly have held that public defenders and attorneys appointed by the court to represent indigent defendants do not act under color of state law, even though the state may pro-

vide their compensation. The Eighth Circuit Court of Appeals held below that the fact that the defenders in the Polk County Offender Advocate's program were selected, paid, hired, and fired by the County was sufficient state involvement to constitute "color of state law" on the part of such defenders. However, an analysis of the Supreme Court's opinion in Ferri v. Ackerman, the great weight of federal case law, and the fact that public defenders owe their loyalty solely to their client and are allowed to act independently of governmental control demonstrates that the Eighth Circuit's decision is incorrect and must be reversed. Public defenders should be found not to act under color of state law for the purpose of an action under 42 U.S.C. §1983.

A. GOVERNMENT-SPONSORED PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW IN REPRESENTING INDIGENT DEFENDANTS SINCE THEIR RESPONSIBILITIES PARALLEL THOSE OF PRIVATELY RETAINED DEFENSE COUNSEL: THEY ACT INDEPENDENTLY OF GOVERNMENTAL CONTROL IN REPRESENTING

INDIGENT CLIENTS, OWE THEIR LOYALTY SOLELY TO THE CLIENT, AND ARE FREE TO PERFORM THEIR FUNCTIONS IN ESSENTIALLY THE SAME MANNER AS IF PRIVATELY RETAINED.

It cannot be disputed that, in Iowa, the public defender is a county employee who is specifically authorized by statute to defend persons charged with public offenses who are financially unable to employ counsel. To be sure, there are connections between the public defender and the government. The court selects him to represent a particular individual, while the county pays his salary and furnishes him with office space, furniture and supplies. But, these ties with governmental bodies are simply not enough to find the public defender "acting under color of state law."

Indeed, one court has pointed out that, far from constituting action of the government, the appointed defense counsel is obligated to "oppose the efforts of

the state". Vance v. Robinson, 292 F. Supp. 786, 788 (W.D. N.C. 1968). An attorney's allegiance is to his client, not to the person who happens to be paying him for his services.[3] Moreover, the function of public defenders, once assigned to a case, is the same as that of privately retained defense counsel; whether he is a court-appointed attorney or a public defender, he is to represent the indigent suspect with the same professional competence as if he had been retained by a fee-paying client.[4] As Chief Justice Burger noted several years ago:

> ". . . the defense counsel who is appointed by the court or is part of a legal aid organiza-

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[3] Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975).

[4] "Whether an indigent is represented by an individual or by an institution, he is entitled to the same level of competency as that generally afforded at the bar to fee-paying clients." Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970).

> tion, has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer."
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> Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 1, at 6 (1969).

Integral, then, to the conclusion that the public defender does not act under state law is the belief that he has an affirmative duty to independently protect his client's interests and hence is not controlled by the state. The common theme of the decisions supporting this view is that compensation by the government does not result in government control of the public defender, and that appointed counsel are as much "private" as their retained counterpart.[5] Indeed, the only act of the public defender with respect to the representation of a criminal defendant which involves the exercise of state

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[5] Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978).

power is his decision to represent or to refuse to represent an accused. Thereafter, once he is appointed or assumes the defense of the accused, the public defender in all matters of pre-trial, trial, sentencing and appellate procedure exercises no authority other than that of the attorney for the accused. As stated by the California Supreme Court:

> "Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before this court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents."
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> In Re Hough, 24 Cal.2d 522, 528-9 (1944).

Similarly, the Tenth Circuit Court of Appeals has taken the view that since the statutes creating a means of funding public defender offices do not attempt to control or influence the professional judgment of the defenders, it cannot be said that the actions of the defender constitute state action:

> "The Colorado office of State Public Defender derives its existence from Colorado statutes . . . Those statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally, a Colorado public defender's professional duties and responsibilities toward his clients are identical in all respects to any other Colorado attorney whether privately retained or court-appointed.
>
> Therefore, we hold that an attorney does not act under color of state law simply because he has accepted employment as a Colorado public defender."
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> Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972); see also Brown v. Joseph, 463 F.2d 1046, 1048 (3rd Cir.

1972); United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

Other courts have reasoned that the relationship between the county and the public defender is similar to that between an independent contractor and the party contracting for his services.[6] The county has no control over the manner of representation given indigents by the defender, and the nature of the work involves the attorney-client relationship and is of a type that precludes outside interference or direction by the county. The public defender's professional relationship with his client takes on all the obligations and protections attendant upon a private attorney-client relationship except one: the public pays his salary. As stated in 1975 by the Supreme Court of

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[6] Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975).

Connecticut:

> ". . . it is clear as a matter of law that the status of a public defender, once the attorney-client privilege attaches, is that of an independent contractor, rather than that of an employee . . .
>
> The Connecticut public defender system derives its support from our statutes, but these in no way attempt to control or otherwise influence the professional judgment of a lawyer who acts as a public defender. Once assigned, the public defender is free to act in behalf of his client, as if he had been employed and retained by the defendant whom he represents. The source of his compensation may be different, but otherwise the relation of an attorney and client is the same."
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> Spring v. Constantino, 168 Conn. 563, 362 A.2d 871, at 877-8 (1975).

Public defender offices, then, were created in order "to place indigent defendants as nearly as may be on a level of equality with non-indigent defendants in the defense of criminal cases." United States v. Tate, 419 F.2d 131, 132

(6th Cir. 1969). The parity between public defenders and retained counsel was envisioned by the founders of defender offices and has been recognized by all who have scrutinized their relationship. The Standards Relating to Providing Defense Services approved by the American Bar Association House of Delegates in February, 1968, set forth the basic principle that defenders and assigned counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."[7] As the commentary thereto points out, "[a] system which does not guarantee the integrity of the professional relationship is

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[7] American Bar Association Project of Standards for Criminal Justice, Standards Relating to Defense Services (1968), §1.4 at p. 6.

fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain."[8] It is this freedom of action that state and local legsilatures undoubtedly had in mind when they first created public defender offices. Such offices establish a system of appointed counsel who are independent of government control, owe their loyalty solely to the client, and are free to perform their functions in as nearly as possible the same manner as if privately retained.

In conclusion, once a public defender accepts the representation of an accused, his public or state function ceases, and thereafter he functions purely as the lawyer of the accused, exercising the rights and powers of the accused. His one interest is the repre-

[8]American Bar Association Project of Standards for Criminal Justice, Standards Relating to Defense Services (1968), §1.4 at p. 19.

sentation of the legitimate interests of his clients; his professional relationship with his client is identical to that of a private attorney, except with respect to payment. His standard of competency within Sixth Amendment standards must comport with that of private defense counsel. United States v. Moore, 432 F.2d 730 (3rd Cir. 1970). Moreover, he acts not as a representative of the state, but as a representative of his client. In short, the status of a public defender is no different, for these purposes, than that of retained counsel. The mere fact that the latter is paid by the individual with means and the former by the government on behalf of the individual without such means is an inadeqaute basis for concluding that public defenders act under color of state law in representing indigent defendants.

B. THE FACT THAT THERE IS STATE FUNDING AND STATE INVOLVEMENT IN THE POLK COUNTY OFFENDER ADVOCATE PROGRAM DOES NOT COMPEL A FINDING THAT THE

ATTORNEYS EMPLOYED IN THE OFFICE ACT UNDER COLOR OF STATE LAW; PAYMENT BY THE STATE DOES NOT ENDOW PUBLIC DEFENDERS WITH ANY POWERS NOT ALREADY POSSESSED BY THEIR VIRTUE OF BEING LICENSED TO PRACTICE LAW.

The great majority of federal courts that have been faced with the question have refused to hold that mere governmental compensation to attorneys for the representation of indigents in criminal prosecutions invests that individual with color of law or badge of office.[9] This viewpoint has maintained widespread support, even where the state not only provides the public defender with compensation but also structures the organization through which he volunteers and operates.[10] Such a finding conforms with the vision of the individuals who founded the first public defender offices - to

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[9] Vance v. Robinson, 292 F.Supp. 786, 788 (W.D. N.C. 1968).

[10] Peake v. County of Philadelphia, 280 F.Supp. 853 (E.D. Pa. 1968).

compensate rather than make a governmental function out of the representation of indigents.

It is important to note that the case of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), did not stand for the general proposition that whenever there is state funding and state involvement in a program, the actors of the program are automatically exposed to §1983 liability. Justice Clark's opinion drew narrow boundaries:

> ". . . Specifically defining the limits of our inquiry, what we hold today is that when a state leases public property in the manner and for the purpose shown to have been the case here, the proscription of the Fourteenth Amendment [referring to prohibitions on racial discrimination] must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself . . ."
>
> Burton, supra, at 720.

Indeed, in Burton, supra, the state's extensive participation in the

operation of a private parking facility provided the comprehensive involvement necessary for a finding of state action.

Moreover, although individuals may occupy positions which are publicly-funded and authorized by statute, as do public defenders, this does not compel a conclusion that they are state officers. Instead, it is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations. Furthermore, payment by the state does not endow the public defender with any powers not already possessed by virtue of being licensed to practice law in the state.[11] Indeed, should he desire to do so without compensation, he could represent the indigent defendant absent any appointment at all.[12] As stated by

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[11] United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

[12] Mallen, The Court-Appointed Lawyer and Legal Malpractice - Liability or Immunity, 14 American Criminal L.Q. 59, 62 (1976).

a federal court which held that state election officials certifying the election of a U.S. Senator pursuant to federal requirements were not acting under color of state law:

> "It is not defendants' status as state officials that is determinative, it is the nature of the acts performed by them."
>
> Philips v. Rockefeller, 321 F.Supp. 516, 521 (S.D. N.Y. 1970), affirmed on other grounds 435 F.2d 976.

Similarly, a public employee does not act under color of state law unless the act in question utilized or depended upon state power or authority:

> "Except for the fact that she was a city employee nothing about Shepherd's activity, or the effect thereof, was in any way dependent upon, or enhanced by, any state power or authority vested in her."
>
> Place v. Shepherd, 446 F.2d 1239, 1244-45 (6th Cir. 1971) (holding that acts were not "under color of" state law).

If a public defender makes an objection in the cause of a trial, the objection is not an exercise of state power,

nor is it in any way dependent upon or enhanced by state power. It instead is an exercise of the power of the accused under the Sixth and Fourteenth Amendments and the Iowa Constitution. Similarly, whether a public defender recommends a plea of guilty or not guilty, he is acting as counsel for the accused and not as an officer of the state in the exercise of state power.

In holding that a New Jersey public defender did not act under color of state law despite authorization and funding through a state statute, the United States District Court for New Jersey stated:

> "The New Jersey State Public Defender Act did not clothe the instant defendants with a 'power' that they did not already possess. These defendants were empowered to represent plaintiffs by virtue of their being licensed to practice law pursuant to R. R. 1:21-1 et seq. Moreover, though remunerated by the State of New Jersey, these public defenders were neither servants nor representatives of the state,

> nor were they controlled by the state."
>
> United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

Thus, it is not the employment status of the person, but the nature or source of the power exercised in the alleged violation that determines whether the person acted under color of state law. And a public defender in his representation of a client does not exercise state power or authority, but rather exercises as a lawyer the rights and powers of a criminal defendant. Very simply, his actions as a defense attorney are neither enhanced by nor dependent upon state power or his position as a public defender. Consequently, it follows that he does not act under color of state law in the representation of a criminal defendant.

C. THE GREAT WEIGHT OF CASE LAW SUPPORTS THE VIEW THAT PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW IN REPRESENTING INDIGENT DEFENDANTS.

The majority of federal courts that have considered claims against public defenders under 42 U.S.C. §1983 have concluded that such defenders do not act under color of state law so as to give federal courts jurisdiction over such matters.[13] Furthermore, in every United States Circuit but one, a federal court has declined jurisdiction in a suit brought under the Civil Rights Act on the ground that a court-appointed lawyer does not

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[13] Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972); United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.C. N.J. 1971); Peake v. County of Philadelphia, 280 F.Supp. 853 (E.D. Pa. 1968); Skipper v. Brummer, 598 F.2d 1256, 1265 (5th Cir. 1978); See also Brown v. Joseph, 463 F.2d 1046, 1047-9 (3rd Cir. 1972) (while not deciding issue, court states that they find it "difficult to perceive color of law" in the activities of public defenders); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (court notes in dicta that state action claim, as applied to a public defender, is "tenuous".)

act under color of state law.[14] The view rests on the general premise that the public defenders or court-appointed attorney's role is analagous to that of the private criminal defense lawyer.

Plaintiffs in these actions have asserted a variety of grounds for a finding of state action. It is most frequently urged that the public defender acts under color of state law since he is paid by the state, and that he acts "as an officer of the court".[15] Rejecting the claim that remuneration by the state is

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[14] First Circuit: Page v. Sharpe, 478 F.2d 567 (1st Cir. 1973); Second Circuit: U.S. ex rel. McClaughlin v. New York, 356 F.Supp. 988 (E.D. N.Y. 1973); Third Circuit: Thomas v. Howard, 455 F.2d 228 (3rd Cir. 1972); Fourth Circuit: Shelton v. Randolph, 373 F.Supp. 448 (W.D. Va. 1974); Fifth Circuit: Nelson v. Stratton, 469 F.2d 1155 (5th Cir. 1972); Sixth Circuit: Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968); Seventh Circuit: French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970); Eighth Circuit: Barnes v. Dorsey, 480 F.2d 1047 (8th Cir. 1973); Ninth Circuit: Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972).

[15] Johnson v. Kreider, 246 F.Supp. 188 (M.D. Pa. 1967).

in itself sufficient to support a finding that the attorney acted under color of state law, one district court observed that regardless of whether the attorney was paid by the state, "his duty was to oppose the efforts of the state to convict his client. His actions, good or bad, were not done for the state nor under color of any statute, ordinance, regulation, custom or usage." Vance v. Robinson, 292 F.Supp. 786, 788 (W.D. N.C. 1968).

Nor does state action exist simply because a public defender is an officer of the court, as this does not make him an agent of the state.[16] The courts have emphasized that professional responsibilities of government-paid and of private attorneys are identical, in each instance flowing from the same Canons of Ethics.[17]

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[16] Phillips v. Singletary, 350 F.Supp. 297 (D.S.C. 1972).

[17] Vance v. Robinson, 292 F.Supp. 786 (W.D. N.C. 1968).

The Third Circuit succintly set forth the viewpoint of the various federal courts on this issue, when it stated:

> "The public defender argues that once his appointment in a given case is made, his public, or state, function ceases, and that thereafter he functions purely as a private attorney, concerned with and absorbed by one interest - that of serving a private client. His professional relationship with his client takes on all the incidents and considerations attendant upon a private attorney-client relationship except one: the public pays his fee. His standard of competency must comport with that reflecting normal competency of all defense counsel whether privately retained, volunteered, or publicly paid . . . He has but one loyalty - and that is to his client, and not to the state, or to the collective citizenry thereof."
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> "Therefore, he argues, with considerable persuasion, that every aspect of his professional relationship to his client, within the framework of ethical representation thereof, which conceivably could form the subject matter of a claim under §1983, is performed by him not as a representative of the state, under color of state law, but

> in the context of a private practioner. The attorney-client confidential relationship is preserved. His client is not the Common Wealth of Pennsylvania, whose legislative processes created his office; nor the people of Allegheny County, who appointed him to office and pay his salary. His client is a private individual, who, by reason of indigency, is unable to retain and compensate other counsel. Essentially, he is state-paid private counsel, assigned the responsibility of protecting the interest and defending the rights of a client . . ."
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> ". . . the fact that one comes to his court-appointed role as a result of a state-mandated and county-financed system, does not, in any respect whatsoever, distinguish his professional responsibility to his client from that of any attorney appointed to serve without pay, or paid by a legal aid society financed largely by private contributions. We find it difficult to perceive 'color of law' in the activities of the first category, and deny its existence in the latter."
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> Brown v. Joseph, 463 F.2d 1046, 1047-8 (3rd Cir. 1972).

Other federal courts have adopted the rationale that the relationship between

a public defender and an indigent defendant is a "personal relationship of trust and confidence governed by the canons of professional ethics."[18] The "public" nature of the relationship is seen merely as something incidental to the professional relationship of attorney and client. This view is identical to the view adopted by the majority of federal courts in disposing of §1983 actions against court-appointed attorneys:

> "The lack of state action for volunteer court-appointed counsel follows from the nature of the attorney-client relationship underlying disputes such as the instant one. The court-appointed attorney, like any retained counsel, serves his client. He represents his client, not the state. The ancilliary facts that the court has a hand in providing counsel, and that the attorney selection board . . . obtains its authority from statute, do not alter the attorney-client relationship. That

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[18] Sanchez v. Murphy, 385 F.Supp. 1362 (D. Nev. 1974).

> relationship is our concern here. Accordingly, . . . the situation presents no state action."
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> United States ex rel. Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976).

Precisely because the nature of the attorney-client relationship remains the same whether the lawyer comes to his position in a privately retained fashion, as a court-appointed counsel, or as the result of his employment in a public defender's office, federal courts have been understandably reluctant to make distinctions that would permit finding no color of state law in the first two instances, as the courts have uniformly held, but would require a finding of state action in the latter. The Supreme Court should follow the rationale of the lower federal courts and rule that, since public defenders are free to act on behalf of their clients in the same manner as if they have been employed and retained by them, they, like

court-appointed and privately retained counsel, do not act under color of state law.

D. THE SUPREME COURT'S RECENT DECISION IN FERRI V. ACKERMAN HOLDS FIRMLY TO THE VIEW THAT APPOINTED ATTORNEYS SHOULD BE SUBJECT TO EXACTLY THE SAME LIABILITIES THAT PRIVATELY RETAINED ATTORNEYS FACE; SINCE PRIVATE LAWYERS ARE NOT LIABLE IN A 1983 ACTION BECAUSE THEY DO NOT ACT UNDER COLOR OF STATE LAW, A LOGICAL EXTENSION OF FERRI COMPELS THE CONCLUSION THAT PUBLIC DEFENDERS ALSO ARE NOT "STATE ACTORS" SO AS TO BE LIABLE UNDER §1983.

The United States Supreme Court in Ferri v. Ackerman, 444 U.S. 193 (1979), reversed the Pennsylvania Supreme Court[19] and held that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by a former client. In a unanimous opinion, this Court decided that the function of appointed

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[19] Ferri v. Ackerman, 483 Pa. 90, 394 A.2d 553 (1978).

counsel is more closely analagous to that of privately retained counsel, who enjoy no immunity from malpractice prosecution, than to that of judges and prosecutors who have traditionally been accorded immunity at common law.[20] Justice Stevens' opinion refused to consider federally appointed counsel as officers of the federal government acting in the course of their duties, and concluded that lawyers appointed under the Criminal Justice Act[21] to represent indigents do not become officers of the federal government.

In Ferri, supra, the court found no statutory basis for a grant of immunity to federally appointed attorneys. Indeed, the only arguably relevant statute, the Federal Criminal Justice Act, attempted to minimize the difference between private-

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[20] Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1871).

[21] Criminal Justice Act of 1964, 18 U.S.C. §3006 A (1976).

ly retained and court-appointed counsel by compensating appointed attorneys. The court decided that the purpose of the law was that appointed attorneys should be subject to the same liabilities that retained lawyers face.[22]

The court went on to recognize that some federal officers had been granted immunity in the absence of any statute.[23] It reasoned that the duties of federally appointed attorneys, however, were significantly different from the duties of those officials who had been granted immunity at common law, such as judges and prosecutors. Such officials were required to represent the interests of society as a whole, and the immunity granted to them was designed as a protection from disgruntled groups whose desires were not always identical to those of the

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[22] Ferri v. Ackerman, 444 U.S. 193, at 199-200 (1979).

[23] Ferri v. Ackerman, 444 U.S. 193, at 202 (1979).

public. In contrast, the court recognized that an appointed attorney's only duty is to the defendant he is appointed to represent. He has no conflicting responsibility to the public and can avoid malpractice suits by fulfilling his duty to the defendant.

The pivotal question, then, in Ferri, supra, was whether appointed counsel is more analagous to judges and prosecutors, or to retained counsel. This court found it to be the latter:

> ". . . There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification

for official immunity . . .

In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation . . .

. . . Having concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine . . . is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of congress to create immunity, we hold that federal law does not now provide immunity for court-appointed counsel in a state malpractice suit brought by his former client."

Ferri v. Ackerman, 444 U.S. 193, at 202-4 (1979).

In the Ferri decision, the court drew an important distinction in the meaning of the term "federal officers". After noting that an attorney appointed to represent an indigent defendant in a federal criminal trial is also a federal officer,[24] the opinion goes on to distinguish between the nature of appointed counsel's responsibilities and those of other officers of the court. The court refused to include federally appointed counsel as part of an equilateral triangle with the judge and prosecutor, finding a "marked difference" in the nature of counsel's responsibilities. The court declined to view appointed counsel as a government employee, official, or advocate, holding that such counsel must remain independent of government interests, and, indeed, must zealously oppose the govern-

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[24] Ferri v. Ackerman, 444 U.S. 193, at 202 (1979).

ment in litigation.[25] The Court's opinion, then, drew a parallel not between the prosecutor and defender, but between appointed counsel and privately retained counsel. The court evidently realized that it was through this approach that the vitality of the adversary system could best be transmitted to indigent defendants.

Very possibly, the Supreme Court's decision in Ferri, supra, may detract from the argument that public defenders should enjoy absolute immunity from actions under §1983, an argument raised by the Petitioners in Division II of this Brief. Though its opinion was specifically limited to the immunity of federally appointed attorneys in state malpractice actions, the court in Ferri has nonetheless adopted a conservative stance and a restrained position on the immunity issue. However, the most outstanding mandate of

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[25] Ferri v. Ackerman, 444 U.S. 193, at 204 (1979).

the decision is the strong position of the court that appointed defense counselors are private and independent of any cloak of governmental control. The court appears to reject the view that the judge, prosecutor, and defender are a trinity operating for the public good. Rather, it holds firmly to the position that the role of an appointed defense counsel is that of a private, non-official adversary to the government position, whose loyalty is owed solely to the client.

The important implication of Ferri, then, is that since court-appointed counsel's responsibilities and duties toward a client parallel exactly those of privately retained counsel, they should be subject to exactly the same liabilities as private counsel. Thus, since a privately retained lawyer is subject to malpractice litigation, the court reasoned that appointed counsel should be subject to the same malpractice liability. Follow-

ing this position, a logical extension of Ferri is that since retained counsel are not liable under §1983 because they do not act under color of state law, court-appointed lawyers and public defenders should be free from liability under the Civil Rights Act since they are not "state actors". Since the duties and responsibilities of privately retained counsel and court-appointed defenders are identical in all respects, both should be found not to act under color of state law for the purposes of §1983 litigation.

The purposes of the Federal Criminal Justice Act are essentially the same as the goals of local and state public defender statutes - to provide for and compensate attorneys appointed to represent indigent defendants in criminal trials. The Supreme Court in Ferri, supra, specifically noted that in enacting the Criminal Justice Act, Congress clearly wanted appointed counsel to share as much

of retained counsel's characteristic independence from the government as was possible notwithstanding the government's subsidy.[26] As a result, the court decided that appointed attorneys should be subject to the same malpractice liability that privately retained lawyers must face from unhappy clients. In the same light, state-appointed public defenders share the same independence and unbridled discretion that retained lawyers possess in the representation of criminal defendants. As such, and in view of the mandate of Ferri, they too should be subject to the same liabilities as private counsel. The resulting logic compels a conclusion that since retained attorneys do not act under color of state law for the purposes of §1983, public defenders also are not "state actors" so as to be liable under the Civil

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[26] Ferri v. Ackerman, 444 U.S. 193, at 199 (footnote 16) (1979).

Rights Act. Any other conclusion would simply be irrational in light of the Ferri decision.

II

THE COMMON LAW, THE PUBLIC INTEREST, AND THE AVAILABLE ALTERNATIVES TO §1983 LIABILITY SUPPORT A DECISION THAT PUBLIC DEFENDERS ARE ABSOLUTELY IMMUNE FROM SUIT UNDER 42 U.S.C. §1983.

Public Defenders are generally appointed and compensated by state and municipal governments and perform the critical governmental function of representing indigent defendants in state criminal trials. The Court of Appeals for the Eighth Circuit below held that the grant of a qualified immunity to public defenders is an appropriate compromise between the interests of public defender offices on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights have been violated. However, an analysis of

the common law, public policy, and the available alternatives to §1983 liability demonstrate that the Eighth Circuit's decision granting public defenders only a qualified immunity is incorrect and should be reversed. Public defenders must be given absolute immunity from civil liability for damages under 42 U.S.C. §1983.

A. THE COMMON LAW ABSOLUTE PRIVILEGE FOR COUNSEL IN DEFAMATION SUITS COMPELS A SIMILAR ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS FROM ACTIONS UNDER 42 U.S.C. §1983.

Initially, it should be noted that the American common law has long recognized an absolute immunity in defamation actions for counsel engaged in judicial proceedings. In both the United States and Great Britain, the law of defamation has long protected both prosecutors and defense lawyers from suit for any statements made in the courtroom or in briefs and pleadings so as to prevent litigants from weighing all decisions in terms of

potential liability. Professor Prosser states the rule as follows:

> "As in the case of other acts in his judicial capacity, therefore, the judge is absolutely privileged as to any defamation he may utter, even though he knows it to be false and is motivated by personal ill will towards the plaintiff . . . Likewise the privilege extends to counsel in the conduct of the case . . ."
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> Prosser, Handbook on the Law of Torts, section 114, p. 777-778 (4th Ed. 1971) (footnotes omitted); See also Yaselli v. Goff, 12 F.2d 396, 403 (2nd Cir. 1926).

The House of Lords, in rejecting a suit against a barrister for alleged malpractice in a criminal proceeding, stated:

> "It is all part of the long established general policy that judges, witnesses, and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest."
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> Rondel v. Worsley, 1 A.C. 191, at 284 (1969).

An excellent summary of the American and English law on the subject of absolute

immunity up to the year 1909 stated the policies behind it as follows:

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. . . ."
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> Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Columbia Law Reivew, 463, 469 (1909) (footnotes omitted).

The basic idea of privilege in the law of defamation, then, is the same as that in other instances of privilege in the law of tort.[27] It proceeds from a general conviction that although sound policy requires that certain general types of conduct be made the basis for legal liability, there are exceptional circumstances where persons engaging in such conduct should be protected fully. The rule of absolute immunity is founded upon the principle that in certain occasions it is indispensable, or at least advantageous, to the public interest that persons should speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation.[28] Since the interest is one of paramount importance, considerations of

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[27] 3 Restatement of Torts §582, Comment h

[28] Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Columbia L.Rev. 463, 465 (1909).

policy require the public defender to be absolutely immune from false statements, without regard to his purpose or motive, or the reasonableness of his conduct.

Contrary to any argument that only prosecutors and judges have been accorded absolute immunity, similar immunity has been accorded to virtually all participants who fulfill an important governmental function in our judicial process. The courts have held, for example, that grand jurors,[29] court clerks,[30] court reporters,[31] probation officers,[32] and bar association members participating in

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[29] Butz v. Economou, 438 U.S. 478, at 509-11 (1978); Turpen v. Booth, 56 Cal. 65 (1880).

[30] Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969); Pritt v. Johnson, 264 F.Supp. 167 (N.D. Pa. 1967).

[31] Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969); Morrow v. Igleburger, 67 F.R.D. 625, 689 (S.D. Ohio 1974).

[32] Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970); Friedman v. Younger, 282 F.Supp. 710, 715-16 (C.D. Cal. 1968).

disciplinary proceedings[33] are immune from liability. As the Ninth Circuit Court of Appeals has explained, the "key to the immunity" is that the allegedly improper conduct occurred "in the performance of an integral part of the judicial process". Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965). And Mr. Justice Stevens himself has observed, it is this very "performance . . . of public services which play such a significant role in our administration of justice" which justifies the doctrine of immunity for court-appointed defense attorneys. Walker v. Kruse, 484 F.2d 802, 805 (7th Cir. 1973) (opinion of Stevens, J.).

The absolute immunity of a public defender rests upon the most obvious grounds of public policy; it is designed to secure their complete independence and thus ad-

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[33] Kissell v. Breskow, 579 F.2d 425, 428-30 (7th Cir. 1978).

vance the pursuit of justice. The immunity looks, therefore, to the free and unfettered administration of justice, though as an incidental result it may in some instances afford protection to the malignant defamer. It is certainly not directed against persons injured by specific actions or defamation but is intended to protect various actions in judicial proceedings, including the filing of pleadings, the questioning of witnesses, and the conduct of the trial. The freedom of the participants in litigation from the fear of civil liability is deemed to advance the pursuit of justice and to outweigh private claims for redress.

Yet, if the very same acts, that is, the filing of pleadings, questioning of witnesses, and conduct of trial, are held to expose counsel to liability under 42 U.S.C. §1983, although not to liability for defamation, the purpose of the age-old immunity for defamation would be substan-

tially undercut. The defamation immunity would no longer achieve its purpose of protecting certain acts; it would merely have the random and meaningless function of defeating liability of a certain nature. Any competent drafter of pleadings could easily avoid its effect when bringing an action against a public defender.

As a result, if Mr. Dodson prevails in this matter, no public defender could fearlessly question a witness at trial without fear of civil liability, regardless of the historic defamation immunity. Consequently, unless the public defender is accorded absolute immunity under §1983 for actions taken in the course of representing a defendant, this court will have effectively abrogated the substance of the common law defamation immunity. In addition, to subject the public defender to such actions would be to restrain him in the full pursuit of the duty which he owes to his client, and which the success-

ful administration of justice demands. Thus, the public interest and legal tradition support a rule of absolute immunity under 42 U.S.C. §1983 for public defenders in the conduct of their official duties in the presentation or defense of a criminal case.

B. THE PUBLIC POLICY INTERESTS UNDERLYING THE IMMUNITY DOCTRINE AND THE CRIMINAL JUSTICE SYSTEM SUPPORT A GRANT OF ABSOLUTE IMMUNITY TO PUBLIC DEFENDERS FROM ACTIONS UNDER 42 U.S.C. §1983.

1. THE INTEREST IN ENCOURAGING PUBLIC DEFENDERS TO FEARLESSLY DISCHARGE THEIR DUTIES TO INDIGENT CLIENTS SUPPORTS A RULE OF ABSOLUTE IMMUNITY.

As this Court has recognized in the past, immunity is not granted for the benefit of those officials who are actually at fault in their actions. Instead, it is directed solely "for the benefit of the public whose interest it is that the [officials] should be at liberty to exercise their functions with independence and without fear of consequences."[34] In

[34] Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1968); quoted in Pierson v. Ray, 386 U.S. 547, 554 (1967).

light of the increased concern that government-paid defense counsel especially may face a sizable number of lawsuits from unhappy clients, it is important to understand that the principle of absolute immunity actually is in the best interests of the indigent criminal defendant. Indeed, a close analysis of the subject leads to the conclusion that the threat of liability under 42 U.S.C. §1983 would not render more effective legal service by public defenders, but would impair defense counsels' ability to fulfill his responsibilities both to the client and to the administration of justice.

The role of the public defender, perhaps more than that of the judge or prosecutor, requires freedom of action. The defender must be unfettered in his vigorous and fearless defense of the accused. Often the courtroom climate is hostile to his efforts when he represents an unpopular client. As he exerts every

effort to provide effective representation, he should not be called upon to measure his every word in relation to the personal consequences of a damages suit by his client. As Justice Learned Hand stated:

> "[I]t is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation . . ."

> Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), quoted with approval in Barr v. Matteo, 360 U.S. 564, at 571 (1959).

Initially, the spector of liability would significantly affect the exercise of the public defender's independent judgment as to such matters in the conduct of litigation as the making of pre and post-trial motions, and the examination and cross examination of witnesses. It has been significantly recognized that effective representation of a defendant requires that the "power of decision" in such strategic and tactical areas "must rest with the lawyers".[35] To subject the public defender to liability under §1983 would significantly impair the ability of publicly financed defense attorneys "to

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35 American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft, 1971), §5.2(b), at p. 240.

make strategic decisions with regard to a single litigant as to how best his interests may be advanced." Minns v. Paul, 542 F.2d 899, at 901 (4th Cir. 1976).

In addition, the threat of liability could divert the public defender's attention away from defending his client's interests in full. In order to prevail in such a §1983 action, the indigent defendant would have to show that he would have been acquitted except for the defender's poor representation, and possibly that he was actually innocent of the charges against him.[36] To allow such suits by disgruntled clients would be to place the public defender in the untenable position of seeking, at least subconsciously, evidence of their client's guilt so as to protect themselves from liability. As stated by the Third Circuit Court of Appeals, such fear of liability would pro-

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36 Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971).

duce "a chilling effect upon defense counsel's tactics" and would catch him "in an intrinsic conflict of protecting himself and representing his client". Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

Perhaps most importantly, absolute immunity helps preserve the independence of professional judgment necessary to ensure that public defenders are able to meet the ethical standards important to the administration of justice. The ethical codes of the legal profession impose obligations on defense attorneys which sometimes conflict with thier client's wishes, such as the duty to disclose adverse legal precedents, to refrain from presenting frivolous claims or arguments, and to abstain from putting irrelevant matters before the jury. In thus assisting public defenders in meeting their professional responsibility to make efficient use of the limited resources of

the criminal defense system, absolute immunity would "encourage counsel in the full exercise of professionalism," including the "discretion, in the light of their training and experience, to decline to press the frivolous . . ." Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977).

Obviously, then, the principle of absolute immunity for public defenders sued under 42 U.S.C. §1983 is supported by exactly the same factors that justified immunity for prosecutors and judges: "concern that harassment by unfounded litigation would cause a deflection of . . . energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Imbler v. Pachtman, 424 U.S. 409, at 423 (1976). Absolute immunity is necessary to allow public defenders to be totally free to exercise their independent judgment in represent-

ing their clients without weighing every decision in terms of potential liability. Public policy prefers that a public defender's decisions be uninfluenced by outside considerations, even at the expense of an individual's priceless reputation. To withhold such a form of immunity would be to inhibit that professional discretion, and would create conflicts between the defender's desire to protect himself and his mandate to represent his client.

2. THE PUBLIC INTEREST IN ENCOURAGING ABLE LAWYERS TO ASSUME PUBLIC DEFENDER ROLES SUPPORTS THE PRINCIPLE OF ABSOLUTE IMMUNITY UNDER SECTION 1983 FOR SUCH DEFENDERS.

Another concern if public defenders are held to be liable to actions under 42 U.S.C. §1983 is ensuring that competent counsel remain willing to serve indigent defendants notwithstanding poor remuneration and civil liability. The federal courts have reasoned that absolute

immunity is necessary to encourage able individuals to become public defenders and that such recruitment would be difficult if defenders were subject to potential §1983 liability by unhappy clients.[37] Additionally, they fear that such a reluctance on the part of attorneys to serve as public defenders will have the very serious effect of jeopardizing the indigent defendants' Sixth Amendment right to effective assistance of counsel.[38] The Third Circuit has so ruled, saying:

> "There are other considerations of public policy. First, there is the desirability of encouraging able men and women to assume public defender roles. To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the presiding judge, and counsel of a co-defendant, privately retained or court-appointed, would be to discourage recruit-

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[37] Minns v. Paul, 542 F.2d 899, at 901 (4th Cir. 1976).

[38] John v. Hurt, 489 F.2d 786, at 788 (7th Cir. 1973).

> ment of sensitive and thoughtful members of the bar."
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> Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

Indeed, this problem of recruitment will be nearly impossible to solve without absolute immunity since the sheer number of §1983 suits likely to be filed against public defenders will certainly deter attorneys from accepting positions with defender offices. Such factors contributing to the potential increase in such actions are that the large caseloads of public defenders do not allow them to have the time to develop personal relationships with each defendant they are appointed to represent, and that indigents are more likely to bring frivolous suits than those retaining counsel.[39] Not surprisingly therefore, the American Bar Association has reported that "this area of practice has steadily lost popularity"

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[39] Robinson v. Bergstrom, 579 F.2d 401, at 410 (7th Cir. 1978).

despite "the demand for more lawyers as defense attorneys in an ever-increasing number of criminal cases."[40]

In addition, one commentor recently noted the numerous pressures to compromise felt by attorneys for indigent defendants: pressure from clients, superiors, opposing counsel, and agency personnel, "many of whom could not do their jobs or make a living unless large numbers of cases were smoothly processed and resolved"; and from judges and other deciders "who clearly recognize that they don't have the resources, time or energy to hear every case on its merits."[41] Recruitment of public defenders would greatly suffer if, in addition to these pressures, defenders faced the prospect of

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[40] American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft 1971), at 151-2.

[41] Bellow, Turning Solutions Into Problems: The Legal Aid Experience, 34 NLADA Briefcase 106, 117 (1977).

being the one person in the system to be held liable in a §1983 action for results that may be attributable to the system itself. Without absolute immunity, such damage actions, often accruing years after a trial, would discourage many of the most qualified persons from becoming public defenders and could potentially be fatal to the attraction of defense counsel for indigent defendants.

3. THE PUBLIC INTEREST COMPELS A GRANT OF ABSOLUTE IMMUNITY SO THAT THE INTERESTS OF PUBLIC DEFENDERS ARE NOT DIVERTED FROM THEIR IMPORTANT PUBLIC FUNCTION OF REPRESENTING INDIGENT DEFENDANTS.

The threat of liability under 42 U.S.C. §1983 to public defenders could also work against the public interest since it would most certainly divert the attention of defenders from their primary function of representing criminal defendants. As experience has shown, the resentment of unsuccessful litigants may easily blossom into §1983 litigation, and defense of even frivolous §1983 suits

would consume the energy of state-subsidized attorneys which should be devoted to representing the interests of other indigent clients. Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976). The Civil Rights Act, which was designed as a shield against the misuse of state power, has itself been subject to great abuse. One federal court has noted that many prisoners do not view a civil action under 42 U.S.C. §1983 as providing ". . . for the redress for genuine grievances or wrongs, but as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but judges, jurors, witnesses and everyone having to do with their conviction." Roberts v. Barbosa, 227 F.Supp. 20, 21 (S.D. Cal. 1964).

Certainly, then, anything less than a grant of absolute immunity would force defense of suits well through the pleading stages, and would place a substantial

drain on an already burdened legal services resource. Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977). Very simply, the necessity to defend §1983 actions alleging malice or wrongdoing would result in a waste of the public defender's time, and would sidetrack his efforts from the public interest in defending indigent clients to the lesser interest in remedying private civil wrongs.

Mr. Justice Stevens' reasoning in a state malpractice action brought against a court-appointed attorney is applicable to the matter at hand. In that case, Justice Stevens stated:

> "Requiring such lawyers to defend charges such as this can only make it more difficult for the Bar to discharge its professional responsibilities which have been so greatly enlarged by the Supreme Court's holding in Argensinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530."
>
> Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) (Opinion

of Stevens, J.).

Significantly, it must be recognized that demands by indigent defendants on public defender offices have increased dramatically. Because of the heavy demand upon legal resources for defense of the indigent, public defenders are often forced to bear case loads which exceed recommended guidelines by 50% or more.[42] In some major American cities, public defenders have annual felony case loads of more than 500 per attorney.[43] In addition, complaints by disgruntled criminal defendants are often filed pro se or in forma pauperis, and are accordingly entitled to liberal treatment by the courts. Haines v. Kerner, 404 U.S. 519, 520 (1972). While such treatment is generally appropriate and should be encouraged, the result for public defenders

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[42] Bazelon, The Defective Assistance of Counsel, 42 U. Cinncinnatti Law Rev. 1, at 6 (1973).

[43] Note, Work Overload and Defender Burnout, 35 NLADA Briefcase 5, 7 (1977).

is that more of these types of actions are likely to get beyond the pleading stage and into lengthy and costly discovery proceedings, thus creating substantial hardships for even the most diligent and sincere defenders.

It should also be noted that other classes of officials have been granted absolute immunity from liability because it was recognized that they would be able to better perform their duties if they devoted more time to government service, rather than to the defense of tort suits. Specifically, in Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court granted certain federal officials immunity so that the defense of malpractice suits would not "consume time and energies which would otherwise be devoted to governmental service." Id. at 571. Such reasoning is equally applicable to the case at hand.

It is inescapable, then, that since public defender offices are already greatly

understaffed and overburdened, their representation of indigent clients would improve if the defense of §1983 suits is not added to their case load. As this court recently held, such claims "could impose unique and intolerable burdens" upon advocates "responsible annually for hundreds" of cases. Imbler v. Pachtman, 424 U.S. 409, at 425-26 (1976). Lord Fry's statement almost 100 years ago concerning absolute immunity remains true today:

> "It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgment against them, but to the vexation of defending actions."
>
> Muenster v. Lamb, 11 Q.B.D. 588, 607 C.A. (1883), quoted approvingly by Lord Reid in Rondel v. Worsley, 1 A.C. 191, at 229 (1969).

4. THE PUBLIC INTEREST SUPPORTS A GRANT OF ABSOLUTE IMMUNITY TO PUBLIC DEFENDERS, SINCE THE FEAR OF §1983

LIABILITY MIGHT DISSUADE DEFENDERS FROM REVEALING WEAKNESSES IN THE CASE OR CONFESSING ERROR FOR A NEW TRIAL.

Perhaps the most direct conflict of interest between the public defender and client which the threat of §1983 liability would create involves the defender's obligation to acknowledge and argue his or her own errors in striving to obtain a new trial or post-conviction relief for the indigent. Very obviously, there would be a conflict between the public defender's duty to fully represent his client's interest by revealing flaws in his case and his interest in protecting himself from civil liability. The fear of §1983 liability could easily discourage defenders from revealing candidly to the courts or clemency boards weaknesses in the defense case or later discovered evidence, thus injuring the pursuit of justice. Furthermore, the background element of a potential civil damage action

might warp the habeas corpus and appellate proceedings by making judges less willing to find misconduct on the part of the defender, and by making counsel more unbending and less apt to confess error.

Thus, the irony of a potential §1983 action against a public defender is that it inhibits the attorney-client relationship and compels the defender to argue the lack of merit in the cause he is supposed to advocate. Indeed, an attorney concerned over his own potential §1983 liability might be induced to present arguments that are actually prejudicial to the defendant. Certainly, there would be a dampening effect on a public defender's acknowledgment of his own mistake in the presentation of the case. Each and every public defender would be rightly concerned that in effectively representing his client, he does not also dictate the complaint for a subsequent §1983 action.

In short, a public defender should be able to admit a mistake without subjecting himself to litigation under the Civil Rights Act. If absolute immunity is not granted the defender, tension might develop between the attorney's duty to zealously represent his client and his instinct of self-protection; as a result, the defender could become reluctant to seek a new trial or habeas corpus, and the quality of legal representation for indigent defendants might suffer accordingly. Certainly, the public defender's obligation to his profession and justice outweigh a private claimant's right to civil compensation. Therefore, §1983 liability should not be created which might cause conflict with the public defender's overriding duties to his client and to justice.[44]

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[44]Compare: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." Bradley v. Fisher, 80 U.S. (913 Wall) 335, at 347, 20 L.Ed. 646, at 649 (1872).

5. THE PUBLIC INTEREST SUPPORTS A RULE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER §1983, SINCE ANYTHING LESS WOULD INVOLVE A FORM OF COLLATERAL ATTACK ON A CRIMINAL JUDGMENT AND WOULD CREATE UNCERTAINTIES AND COMPLICATIONS IN THE CRIMINAL JUSTICE SYSTEM.

Yet another consideration of public policy which supports absolute immunity for public defenders is that interest relating to the prevention of collateral attacks on judicial proceedings by virtue of §1983 damage actions. In such an action, the testimony of the trial judge and the jurors as to the impact of the defender's actions would often be relevant, but would certainly create an uncertainty and confusion in the judicial system. The presentation of a wide variety of complex issues in such a lawsuit often would require a virtual retrial of the original criminal offense in a new forum, and the resolution of some technical issues by the lay jury. Imbler v. Pachtman, 424 U.S. 409, 423 (1976). In addition, proving

damages against the public defender would require a good deal of speculation by the jury as to the effect the defender's negligence had on the conviction, which effort would be made all the more confusing since such a civil matter would be tried with different standards of proof and rules of procedure than that of the original criminal trial. All things considered, such a scenario simply begs for inconsistent results.

The basic interest was well put by Lord Morris of Borth-Y-Gest in Rondel v. Worsley as follows:

> "A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified; it can be kept continually under review. I cannot think, however, that it would be in the public interest to permit a sort of unseemly excrescence upon our legal system whereby someone who has been convicted

> and has, without success, exhausted all the procedures for appeal open to him should seek to establish his innocence (and to get damages) by asserting that he would not have been convicted at all but for the fact that his advocate failed to exercise due care and skill."
>
> Rondel v. Worsley, 1 A.C. 191, at 250 (1969).

6. THE DOCTRINE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS PROMOTES LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTERESTS.

One governmental consideration that appears to have inclined some judges to find absolute immunity for public defenders is the fear that federal courts would be flooded with §1983 suits that are without merit.[45] The dissatisfied former client almost always brings these suits pro se, and from prison. As one court noted, "the experience of the federal courts in federal habeas corpus and §1983 litigation

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[45] Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976);

Brown v. Joseph, 463 F.2d 1046, 1049 (3rd Cir. 1972).

demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976).

In addition to awareness of the practical limitations of defender-provided counsel and of the burgeoning number of §1983 prisoner complaints against such counsel, federal courts have evidenced concern about federalism. In general, federal courts are reluctant to sit in review of the conduct of state courts, as they must do in §1983 actions against public defenders. In Morgan v. Sylvester, 125 F.Supp. 380 (S.D. N.Y. 1954), affirmed 220 F.2d 758 (2nd Cir.), the problem was stated emphatically:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the state court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec

> verba the language of the Civil Rights Act does not give a right of review in the federal courts. To uphold the claim here advanced upon such conclusory allegations would open the door to every aggrieved litigant in a state court proceeding, and set the federal courts up as an arbiter of the correctness of every state decision. This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties."
>
> Morgan v. Sylvester, supra, at 387.

The Morgan court thus viewed the immunity of judicial officers as an appropriate way to block both an improper state-federal court relationship and an increase in federal case load.

C. THE AVAILABILITY OF ALTERNATIVE SANCTIONS AND RESTRAINTS SUPPORTS A FINDING OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER 42 U.S.C. §1983.

It must be emphasized that a grant of absolute immunity for public defenders for actions under 42 U.S.C. §1983 does not leave the public powerless to deter mis-

conduct or to punish that which occurs. Judicial sanctions and professional disciplinary proceedings are readily available against an incompetent attorney, and these remedies can be more objectively applied as they would be imposed by those better informed of the strains of the profession and the intricacies of presenting a criminal defense. The use of such alternatives would leave less room for purely vindictive suits and would result in a more fair evaluation of the merits of the claim. These checks undermine the argument that the imposition of §1983 liability is the only way to insure that public defenders are mindful of the constitutional rights of indigent defendants.

Firstly, all attorneys are bound to represent a client zealously within the bounds of the law. Canon 7, American Bar Association Code of Professional Responsibility. Failure to do so can result in strict disciplinary action being taken.

For years, the courts have imposed various types of discipline on negligent criminal defense counsel, including fines,[46] reprimands,[47] suspension,[48] and disbarment.[49] Such sanctions give assurance that public defenders will invariably faithfully carry out their professional responsibilities.

Another major factor which deters misconduct by public defenders exists under the federal criminal statutory counterpart of §1983, 18 U.S.C. §242.[50] Under this

[46] United States v. Smith, 436 F.2d 1130, 1133 (9th Cir. 1970).

[47] Florida Bar v. Dingle, 220 So.2d 9 (Fla. 1969).

[48] In Re Martin, 30 App. Div.2d 361, 292 N.Y.S.2d 328 (1968).

[49] In Re McDermit, 86 N.J. 17, 114 A. 144 (1921).

[50] 18 U.S.C. §242:

"Whomever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

statute, a public defender may be criminally charged for willful conduct which results in the deprivation of a constitutionally protected right, such as the right to effective assistance of counsel. Robinson v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978). Even judges, who have been cloaked with absolute immunity for centuries, can be punished criminally for willful deprivation of constitutional rights on the strength of 18 U.S.C. §242. O'shea v. Littleton, 414 U.S. 488, 503 (1974).

In addition, the indigent defendant would arguably have the same state action in tort for malpractice against the public defender as a former client might have against a privately retained attorney. Robinson v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978).

As seen, absolute immunity from §1983 actions for the public defender does not mean that he will be allowed to operate

outside of the law and free of its rules. Since he is subject to more restraints, review, and sanctions, including criminal penalties, for wrongful conduct than a private individual, the deterrent of a §1983 damage suit is not necessary to enforce proper behavior.

D. THE SAME FUNDAMENTAL PREMISE WHICH UNDERLIES THE POLICIES SUPPORTING ABSOLUTE IMMUNITY FOR JUDGES, PROSECUTORS, AND OTHER OFFICIALS ALSO SUPPORTS A GRANT OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS.

The identical policy considerations which result in absolute immunity for judges and prosecutors (i.e. the concern that harassment from unfounded litigation will divert an attorney from his public duties and the exercise of his best judgment) are equally applicable to public defenders. Undoubtedly, the very function of the government-sponsored participants in the judicial process often invites a common law tort action. Since judges, prosecutors, and public defenders all

exercise a good deal of discretion for justice's sake during the course of a criminal proceeding, the complete independence of their judgment serves public policy and justifies a grant of absolute immunity. As recently stated:

> "The reasoning which provides immunity for various public officials . . . is also applicable to the performance by private citizens of public services which play a significant role in the administration of justice."
>
> Walker v. Kruse, 484 F.2d 802, 804-5 (7th Cir. 1973).

The American Bar Association Standards §1.1(a) advance the theory that the judge, the prosecutor, and the defense counsel are a tripartite entity operating for the efficient administration of justice.[51] Lower courts have concluded that this tripartite entity exists for the public interest, and each part of the

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[51] American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft, 1971), §1.1(a), at p. 44.

triangle must have equal immunity to function effectively. As stated above, it is argued that identically the same policy considerations for according immunity to the judge and prosecuting attorney exist in favor of the public defender. Indeed, in Imbler v. Pachtman, 424 U.S. 409, 426 (1976), the Supreme Court pointed out:

> ". . . Attaining the system's goal of determining guilt or innocence requires that both the prosecutor and the defense have wide discretion in conduct of the trial and the presentation of evidence."

In finding a public defender absolutely immune from a §1983 suit, the Third Circuit Court of Appeals stated:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders. Implicit in this extension of judicial immunity to prosecutors was the recognition of a public policy encouraging free exercise of professional discretion in the discharge of pre-trial, trial, and post-trial obliga-

> tions. Indeed, the very reasons advanced to assert that the public defender acts under color of state law because of the favorable comparison of his activities with those of public prosecutors, would, a fortiori, support an argument in favor of the public defender on the immunity issue."
>
> Brown v. Joseph, 463 F.2d 1046, 1048-9 (3rd Cir. 1972).

Together in the same courtroom, the judge, the prosecutor, and the public defender perform separate but common functions in a joint effort to achieve substantial justice. The acts of the public defender in representing indigent defendants are, like those of the prosecutor in prosecuting the accused and those of the judge in administering justice, an integral part of the judicial process and are entitled to absolute immunity from §1983 liability.

E. AVAILABLE ALTERNATIVES TO §1983 LIABILITY FOR PUBLIC DEFENDERS PROVIDE SUPERIOR METHODS FOR ENSURING AN INDIGENT DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In addition to the historical and policy arguments outlined above, the basic question arises as to the overall necessity for allowing a §1983 damages action as a remedy for an indigent defendant. Indeed, the individual who is convicted as the result of the failure of his public defender to provide the minimum level of counsel has a number of alternative remedies which are far more effective at vindicating the right to effective assistance of counsel than civil liability would be. The procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these, the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under the law. Imbler v. Pachtman, 424 U.S. 409, at 427 (1976). The availability of such alternatives ensure that the criminal defendant is not left without an adequate legal remedy

with which to assert his rights.

The basic alternatives to a §1983 action were summarized by the Fourth Circuit as follows:

> "Finally, we note that the rule of absolute immunity which we adopt does not leave the typical indigent entirely remediless. If the misconduct of assigned counsel results in a deprivation of a federal right in the defense of a prosecution, redress of the deprivation may be achieved in a direct appeal, a state post-conviction remedy, or by federal habeas corpus . . . if the misconduct of the state-appointed attorney causes the inmate to be unsuccessful in a state habeas corpus proceeding, then federal rights may still be vindicated through federal habeas corpus. Further, if the inmate fears that the state-appointed attorney is incompetent or bears malice, then the inmate may proceed pro se."
>
> Minns v. Paul, 542 F.2d 899, at 902 (4th Cir. 1976).

Furthermore, the indigent may raise the issue of ineffective assistance of counsel in a motion for new trial, where he may have a different lawyer appointed

to represent him.[52] And, as a final alternative, the defendant would arguably have the same state action in tort for malpractice against the public defender as a former client might have against a retained attorney.[53]

It is entirely wrong to assume that the above-mentioned forms of post-conviction relief are inadequate because they do not provide money damages and because they do not directly punish the public defender himself. Reversal of an accused's conviction is the ultimate remedy provided by our judicial system to redress the constitutional right to a fair trial, and this Court's decisions regarding immunity have never suggested that such means are inade-

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[52] Robinson v. Bergstrom, 579 F.2d 401, at 410 (7th Cir. 1978).

[53] Robinson v. Bergstrom, supra, at 411. The Robinson court also disposed of the argument that immunity discriminates in favor of those defendants who are not able to afford retained counsel in a criminal case by noting that a private attorney would not be liable to a §1983 claim. 479 F.2d at 411.

quate merely because the officer who may have been responsible is not punished and a monetary sum is not allowed the defendant. See Imbler v. Pachtman, 424 U.S. 409, at 427 (1976). In fact, post-conviction remedies would appear to be much more effective than §1983 liability, since the former vindicate an indigent's constitutional rights by allowing him a new trial and possible freedom, while the latter involves only monetary damages which do not redress the basic deprivation of liberty that even the successful §1983 claimant would continue to suffer.

Finally, as this Court has previously stated, a rule of §1983 liability for public defenders often "would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice." Imbler v. Pachtman, 424 U.S. 409, at 428 (1976). As the Court in Imbler noted, such post-conviction

proceedings are "focused primarily on whether there was a fair trial under law." Imbler, supra, at 427. "This focus," the court explained, "should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused" could result in the public defender "being called upon to respond in damages" for an alleged "error or mistaken judgment." Imbler, supra, at 427.

As seen, §1983 liability for public defenders would not only fail to provide a superior remedy to post-conviction proceedings, but it would also rob the traditional form of relief of much of its fairness and effectiveness. Therefore, this Court should uphold the ruling of the federal appellate courts that the availability of post-trial relief provides indigent defendants with an adequate remedy. Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

## CONCLUSION

For these reasons, the decision of the Eighth Circuit Court of Appeals should be reversed; public defenders should be found not to act under color of state law for the purposes of 42 U.S.C. §1983, and should be granted absolute immunity from actions brought under that act.

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# APPENDIX

# APPENDIX A

The Iowa Public Defender Act, Chapter 336A, in pertinent part provides:

§336A.1 Office established or abolished. In any county, the board of supervisors may establish or abolish, by resolution of the board, the office of public defender. A county may join with one or more other contiguous counties within its judicial district to establish one office of public defender to serve those counties.

If more than one county is involved in the abolishment of the office of public defender, the office shall not be abolished unless the abolishment is authorized by resolution of the board of supervisors of each of the counties involved.

§336A.2 Contributions to funds. In addition to such funds as may be appropriated from the court fund by the county for this purpose, a county may accept money and other contributions from private

organizations and individuals, and other public agencies, in order to finance the establishment or operation of the office of public defender and be strictly accountable therefor.

§336A.3 Nomination and appointment.

1. The public defender shall be a qualified attorney admitted to practice before the Iowa Supreme Court. When a vacancy exists in the office of the public defender, the district court judges of the judicial district containing the county or counties which the defender is to serve, sitting en banc, shall nominate two attorneys qualified to serve as public defender and certify the names of such nominees to the board of supervisors of the county or counties which the public defender is to serve. The supervisors shall, within thirty days after such certification, appoint by majority vote, one of these nominees to be public defender for a term of six years so long as he

shall remain qualified as otherwise provided in this chapter.

2. The public defender shall represent without charge, each indigent person who is under arrest or charged with a crime if:

a. The defendant requests it; or

b. The court, on its own motion or otherwise so orders.

§336A.4 Indigent defined. For the purpose of this chapter, an indigent shall be any person who would be unable to retain in his behalf, legal counsel without prejudicing his financial ability to provide economic necessities for himself or his family.

Before the initial arraignment or other initial court appearance, the determination of indigency shall be made by the public defender within criteria set by the board of supervisors. At or after arraignment or other initial court appearance, the determination shall be

made by the court.

§336A.5 Compensation.

1. The compensation of the public defender shall be fixed by the board of supervisors.

2. The public defender may appoint as many assistant attorneys, clerks, investigators, stenographers, and other employees as the board considers necessary to enable him to carry out his responsibilities. Appointments under this section shall be made in the manner prescribed by the county board of supervisors. An assistant attorney must be a qualified attorney licensed to practice before the supreme court.

3. The compensation of persons appointed under subsection 2 shall be fixed by the county board of supervisors.

§336A.6 Duty of defender. When representing an indigent person in a criminal proceeding, the public defender shall counsel and defend him, whether he is held in

custody without commitment or charged with a criminal offense, at every stage of the proceedings against him; and prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice.

§336A.7 Other attorney appointed. The court may, for cause, upon the application of the indigent person or the public defender, or on its own motion, appoint an attorney other than the public defender, to represent the indigent person at any state of the proceedings or on appeal. The attorney so appointed shall be compensated as provided in section 815.7.

§336A.8 Report to court. The public defender shall make an annual report to the judges of the district court sitting in any county he serves, the attorney general and the board of supervisors of any county he serves reporting all cases handled by him during the preceeding year.

§336A.9 Office. The county board of supervisors shall provide office space, furniture, equipment, and supplies for the use of the public defender suitable for the business of his office. However, an allowance may be provided in place of facilities. Each item is a charge against the county in which the services were rendered. If the public defender serves more than one county, expenses that are properly allocable to the business of more than one of those counties shall be prorated among the counties concerned.

§336A.10 Time devoted to office. The board of supervisors of a county may require a public defender or assistant public defender to devote his or her full time to the discharge of his or her duties and not to directly or indirectly engage in the private practice of law except that he or she may be a member of a law partnership or a professional corporation on leave of absence.

§336A.11 Prohibited conduct. No public defender or assistant public defender shall directly or indirectly refer any legal matter or civil or criminal litigation to any particular lawyer or lawyers or directly or indirectly recommend or suggest to any person the employment of any particular lawyer or lawyers to counsel in, conduct, defend, or prosecute any legal matter or litigation, if the county is or is likely to be a party thereto or have a substantial interest therein; or receive any direct or indirect fee or compensation for or in connection with any such referral, recommendation, or suggestion. However, he or she may recommend a lawyer when requested to do so by any court, governmental agency, or legal aid society.

## CERTIFICATE OF FILING

I, Thomas M. Werner, hereby certify that I filed my Brief for the Petitioners by depositing forty copies thereof in the United States mail on May 5, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543. I further certify that I will file the revised edition of the Brief for the Petitioners on or before June 1, 1981.

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## CERTIFICATE OF SERVICE

I, Thomas M. Werner, hereby certify that on the 5th day of May, 1981, three copies of the Brief for the Petitioners were mailed, postage prepaid, to John D. Hudson, 510 Fleming Building, Des Moines,

Iowa, Counsel for the Respondent. The revised edition of the Brief for the Petitioners was served on the Counsel for the Respondent on or before June 1, 1981. I further certify that all parties required to be served have been served.

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No. 80-824

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

vs.

RUSSELL RICHARD DODSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. §1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. §1983 for actions taken while representing such indigent clients.

## TABLE OF CONTENTS


*Page*

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTE INVOLVED ..... 2

STATEMENT OF CASE ..... 3

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 8

I. THE PERVASIVE INVOLVEMENT OF THE GOVERNMENT IN THE PUBLIC DEFENDER OFFICE MEANS THAT THE PUBLIC DEFENDER ACTS WITH THE POWER OF THE STATE AND UNDER COLOR OF LAW FOR PURPOSES OF 42 U.S.C. Section 1983 ..... 8

A. The involvement of the state under the Iowa Public Defender Act is pervasive ..... 9

B. Whether the public defender exercises independent judgment and owes his allegiance to his client is not dispositive of action under color of law for § 1983 ..... 12

C. The mutual interdependence of the state of Iowa and the public defender require a finding that the public defender and his assistant act under "color of law" ..... 17

II. AN ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983 IS NOT JUSTIFIED FOR THE PUBLIC DEFENDER AND THE PUBLIC INTEREST OF THAT OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY A QUALIFIED IMMUNITY ..... 22

A. There is no relevant legislative history to Section 1983, but the common law at the time of the statute's enactment recognized the liability of attorneys to their clients ..... 23

B. The role of the defense counsel in a criminal prosecution warrants the defense of only a qualified immunity in actions under §1983 ..... 24

C. There are no compelling public policy considerations warranting public defenders an absolute immunity from suit ..... 28

D. The public interest, and the interests of the public defender and his client are best served by granting the public defender a qualified immunity under 42 U.S.C. §1983 ..... 33

CONCLUSION ..... 37

## TABLE OF AUTHORITIES

*Cases* *Page*

*Anders v. California,*
386 U.S. 738 (1967) ..... 22

*Argersinger v. Hamlin,*
407 U.S. 25 (1972) ..... 29

*Baker v. McCollan,*
443 U.S. 507 (1980) ..... 36

*Braden v. Univ. of Pittsburg,*
552 F.2d 948 (3rd Cir. 1977) (en banc) ..... 13

*Branti v. Finkel,*
445 U.S. 507 (1980) ..... 6,18

*Burton v. Wilmington Parking Authority,*
365 U.S. 715 (1962) ..... 13,17,18

*Butz v. Economu,*
438 U.S. 478 (1978) ..... 23,27,30

*Carey v. Piphus,*
435 U.S. 247 (1978) ..... 31,34,36

*Chalfant v. Wilmington Institute,*
574 F.2d 739 (3rd Cir. 1978) (en banc) ..... 13

*Chapman v. California,*
386 U.S. 18 (1967) ..... 31

*Eccles v. Stephenson,*
6 Ky. 517 (1814) ..... 24

*Ferri v. Ackerman,*
444 U.S. 193 (1979) ..... *passim*

*Gideon v. Wainright,*
372 U.S. 335 (1963) ..... 4,8,25

*Gomez v. Toledo*
444 U.S. 1031 (1980) ..... 36,37

*Griffin v. Illinois,*
351 U.S. 12 (1956) ..... 25

*Hatch v. Lewis,*
175 Eng.Rep. 1145 (N.P. 1861) ..... 24

*Hollenbaugh v. Carnegie Free Library,*
545 F.2d 382 (3rd Cir. 1976) ..... 13

*Imbler v. Pachtman,*
424 U.S. 409 (1976) ..... *passim*

*Jackson v. Metropolitan Edison Co.,*
419 U.S. 345 (1974) ..... 13

*Johnson v. Zerbst,*
304 U.S. 458 (1938) ..... 8

*Lake Country Estates v. Tahoe Regional Planning Agency,*
440 U.S. 391 (1979) ..... 20,21

*Malone v. Sherman,*
49 N.Y. Super. 530 (1883) ..... 24

*Martinez v. California,*
445 U.S. 920 (1980) ..... 36

*McMann v. Richardson,*
397 U.S. 759 (1970) ..... 9

*Miller v. Barilla,*
549 F.2d 648 (9th Cir. 1977) ..... 24

*Minns v. Paul,*
542 F.2d 899 (4th Cir. 1976) ..... 24

*Monroe v. Pape,*
365 U.S. 167 (1961) ..... 34

*Moose Lodge No. 107 v. Irvis,*
407 U.S. 163 (1972) ..... 19

*Norwood v. Harrison,*
413 U.S. 455 (1973) ..... 19

*O'Conner v. Donaldson,*
422 U.S. 563 (1975) ..... 6,12,13,14,27

*Owen v. City of Independence,*
445 U.S. 622 (1980) ..... 36,37

*Parratt v. Taylor,*
40 U.S.L.W. 4509 (May 19, 1981) ..... 35

*Pierson v. Ray,*
386 U.S. 547 (1967) ..... 13,26,27

*Pitt v. Yaldin,*
4 Burr. 2060, 98 Eng.Rep. 74 (K.B. 1767) ..... 24

*Procunier v. Navarette,*
434 U.S. 555 (1978) ..... 12,27

*Robinson v. Bergstrom,*
579 F.2d 401, (7th Cir. 1978) ..... *passim*

*Robinson v. Jordan,*
494 F.2 793 (5th Cir. 1974) ..... 16

*Scheur v. Rhodes,*
416 U.S. 232 (1974) ..... 17,27

*Spring v. Costantino,*
362 A.2d 871 (Conn. 1975) ..... 24

*Stephens v. White,*
2 Va. 203 (1796) ..... 24

*U. S. v. Classic,*
313 U.S. 299 (1942) ..... 18

*U.S. v. Price,*
383 U.S. 787 (1966) ..... 18

*Wood v. Strickland,*
420 U.S. 308 (1975) ..... *passim*

*STATUTES*

United States Code
28 U.S.C. Section 1343 ..... 2
42 U.S.C. Section 1983 ..... *passim*

Code of Iowa
Chapter 336A (1981) ..... *passim*
Section 613A.3 (1981) ..... 35
Section 613A.5 (1981) ..... 35
Section 613A.7 (1981) ..... 34
Section 815.7 (1981) ..... 9

*TEXTS AND REPORTS*

ABA Standards for Criminal Justice: The Defense Function, §717 (1971) ..... 12,14

Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus,* 59 Virginia Law Review 927 (1973) ..... 31,32

Burger, *Counsel for the Prosecution and Defense— Their Roles Under the Minimum Standards,* 8 American Law Quarterly 1 (1969) ..... 15

Note: *Liability of Public Defenders Undr §1983,* 92 Harvard Law Review 943 (1979) ..... 16,21

The National Journal, Vol. III, No. 33, "Scrambling for Jobs in the J.D. Rat Race," Page 1, April 27, 1981 ..... 29

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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**NO. 80-824**

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

vs.

RUSSELL RICHARD DODSON,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The Order of the United States District Court for the Southern District of Iowa, Central Division, of November 5, 1979 (Civil No. 79-507-B) dismissing Mr. Dodson's action is reported at 483 F.Supp. 347, and is found in Appendix "B" to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming in part and reversing in part the

District Court's judgment was filed on August 26, 1980, is reported at 628 F.2d 1104, and is found in Appendix "A" to the Petition for Writ of Certiorari.

## JURISDICTION

This action was filed in the United States District Court for the Southern District of Iowa, Central Division, on November 5, 1979, asserting claims under 42 U.S.C. §1983 and implicitly invoking federal jurisdiction under 28 U.S.C. §1343. (Joint App., pp. 4-23). The District Court dismissed the action the same day, and Mr. Dodson filed a timely Notice of Appeal with the Eighth Circuit Court of Appeals on November 23, 1979. (Joint App., p. 47). The Court of Appeals entered its judgment affirming in part and reversing in part the District Court's opinion on August 26, 1980. (Petition for Cert., App. A). Polk County and its agents filed their Petition with this Court for a Writ of Certiorari on November 21, 1980, alleging grounds specified in Supreme Court Rule 17.1, including a conflict among decisions of various circuits of the Courts of Appeals. This Court granted certiorari on March 2, 1981 (Joint App., p. 49), exercising its jurisdiction under 28 U.S.C. §1343(3).

## STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF CASE

Respondent Russell Richard Dodson filed a Pro Se Complaint in the Southern District of Iowa on November 5, 1979. The Complaint alleged that Martha Shepard, an Assistant Public Defender, had been appointed to represent him on an appeal to the Iowa Supreme Court on a state conviction for robbery. It was alleged that Shepard ultimately moved to withdraw as counsel and to have the appeal dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 104. Respondent alleged that Shepard's actions deprived him of his right to counsel, inflicted upon him cruel and unusual punishment, and arbitrarily denied him his statutory right to an appeal, all in violation of the due process clause of the Fourteenth Amendment. Respondent sought monetary damages and injunctive relief and set out pendent claims for malpractice and breach of contract to handle the appeal.

The Polk County Offender Advocate, the Polk County Board of Supervisors and Polk County were also named as defendants by Dodson. They were alleged to be responsible for Ms. Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals. The jurisdiction of the federal court was specifically invoked under 42 U.S.C. § 1983, and the deprivations were alleged to have been under color of state law. (The Complaint is set out in the Joint Appendix at pp. 1-23).

On November 5, 1979, the Complaint was dismissed by Order of the Honorable Harold D. Vietor. The district court found that the public defender did not act under color of law for purposes of jurisdiction under 42 U.S.C. § 1983. Judge Vietor also found that the Complaint failed to allege sufficient personal involvement of the Polk County Supervisors and Polk County. The pendent state claims were dismissed as well. (The decision of the District Court is set out in the Petition for Certiorari as Appendix B).

A timely Notice of Appeal was filed, and present counsel was appointed by the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the decision of the district court and found that the public defender does act under color of law and is entitled to a qualified immunity. The Honorable William R. Overton, United States District Judge for the Eastern District of Arkansas, sitting by designation, dissented. The opinion of the Circuit Court of Appeals is set out in the Petition for Certiorari as Appendix A.

A timely Petition for Writ of Certiorari was filed by Petitioner. Certiorari was granted on March 2, 1981, to review two issues: (1) Does the public defender act under color of law in representing indigent defendants for purposes of 42 U.S.C. § 1983?; and (2) Is the public defender entitled to a qualified immunity from suit under 42 U.S.C. § 1983? Permission to proceed *in forma pauperis* was granted Respondent on March 2, 1981, and present counsel for Respondent was appointed by this Court on March 23, 1981.

## SUMMARY OF ARGUMENT

### I.

In *Gideon v. Wainright,* 372 U.S. 335 (1963), the Court held that it is the constitutional duty of the State to provide

counsel for indigent criminal defendants. States have traditionally met this obligation in two ways: (1) the appointment of counsel from the private bar, or (2) the establishment of public defender offices by counties or other governmental subdivisions. The involvement of the state and its political subdivisions in the implementation, funding, and supervision of the public defender system means that the public defender and his assistants necessarily act with the power of the state and that the public defender and his assistants act under color of law for purposes of 42 U.S.C. §1983.

The role of the state and its subdivisions in the Iowa public defender system is pervasive. Pursuant to the Iowa Public Defender Act (Chapter 336A, Code of Iowa, 1981), the involvement of the County Supervisors in the office of the public defender includes: the initial decision to create the office, the selection of the public defender and his assistants, approval of salaries and budget of the office and its employees, the definition of "indigency," and review of the program on an annual basis. The public defender is instructed to defend each indigent requesting counsel or on motion or order of the court. The indigent criminal defendant has no choice in the selection of his counsel. The role of the government dominates every aspect of the public defender office in Iowa.

Whether the public defender exercises independent judgment and owes his allegiance to his client is not dispositive of action under color of law for Section 1983. Many public officials or employees exercise judgment independent of their public status and have been found amendable to suit under Section 1983. Thus, this Court has found that prison administrators, mental hospital directors, school administrators, and police officers act under color of law. Similarly, the fact that the public defender owes his allegiance to his client is not controlling on the color of law

issue. This Court in *O'Connor v. Donaldson,* 422 U.S. 563 (1975) implicitly found that a doctor-patient relationship did not negate action under color of law. The instant attorney-client relationship is indistinguishable. Moreover, there are instances when a criminal defense attorney owes a duty to the judicial process that is in conflict with the interests of his client.

The mutual interdependence of the State of Iowa and the public defender require a finding that the public defender acts under color of law. This is essentially a fact finding inquiry. This Court in *Branti v. Finkel,* 445 U.S. 507 (1980) has found on different factors from the instant case that the public defender does act under color of law. The activities of the state in implementing, funding, and supervising the public defender's office "fosters and encourages" the office, and a "symbiotic relationship" is created. The state fulfills its constitutional obligations of providing counsel for indigent defendants through the public defender, and the action of the public defender becomes "state action" under § 1983.

The decision of the Court of Appeals that the public defender and his assistants act under color of law for purposes of 42 U.S.C. § 1983 should be affirmed.

## II.

In *Ferri v. Ackerman,* 444 U.S. 193 (1979), this Court held that attorneys appointed pursuant to the Criminal Justice Act were not entitled as a matter of federal law to absolute immunity for state malpractice claims. This decision is dispositive of the immunity issue in the instant case, for if full immunity is not required for lawyers under the Criminal Justice Act, then it is not required under § 1983.

The decision below, imposing a qualified immunity for public defenders, is an appropriate compromise between the interests of the public, the public defender, and the indigent client.

While *Imbler v. Pachtman,* 424 U.S. 409 (1976) requires an analysis of the common law immunity and contemporary public policy considerations to decide an immunity issue, there is no controlling common law or legislative history regarding public defenders. At common law, it was well established that a client could sue his attorney for breach of contract and negligence. The same rule should be recognized under § 1983.

In reaching its decision in *Ferri v. Ackerman,* 444 U.S. 193 (1979) this Court distinguished the role of the judge, prosecutor, and defense counsel. "The primary rationale for granting immunity to judges, prosecutors, and other public officials does not apply to defense counsel sued for malpractice by his own client." Id. at 204. This Court's prior decisions granting a qualified immunity to various public officials exercising discretionary functions mandates that the same limited defense should be made available to public defenders.

There are no compelling public policy considerations warranting public defenders an absolute liability from suit. There is presently a glut of lawyers available to serve as public defenders and the goal of "unfettered" decision making by public defenders will be preserved by a qualified immunity. The attention of the public defender from his statutory responsibility of representing criminal defendants will not be unnecessarily diverted with a qualified immunity from liability, and the time investment of the federal judiciary will not be significant. The Federal Rules of Civil Procedure provide adequate mechanisms such as motions to dismiss and for summary judgment to deal efficiently with

the frivolous suit. The imposition of an absolute immunity will deprive the meritorious claim of redress and is not justified in this context.

The decision below carefully defined the necessary qualified immunity and this limited defense is justified on public policy grounds. Two major purposes of Section 1983 are to provide compensation for injuries and a federal forum for redress of injuries. State remedies such as habeas corpus, post-conviction relief, and tort claims procedures are inadequate in practice and effect. A federal forum is necessary for the "preservation of human liberty and human rights."

The decision of the Court below should be affirmed in all respects. The public defender acts under color of law and is entitled to a qualified immunity under 42 U.S.C. §1983.

## ARGUMENT

### I.

### THE PERVASIVE INVOLVEMENT OF THE GOVERNMENT IN THE PUBLIC DEFENDER OFFICE MEANS THAT THE PUBLIC DEFENDER ACTS WITH THE POWER OF THE STATE AND UNDER COLOR OF LAW FOR PURPOSES OF 42 U.S.C. SECTION 1983.

In *Gideon v. Wainright,* 372 U.S. 335 (1963), the Court held it is the constitutional duty of the state to provide counsel for indigent criminal defendants. As the Court had explained in holding this same right applicable to federal prosecutions in *Johnson v. Zerbst,* 304 U.S. 458 (1938), the provision of defense counsel for indigents is a governmental

responsibility since the Constitution withholds from the government "the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel". Id. at 463. As this Court has long recognized, "the right to counsel is the right to the effective assistance of counsel". *McMann v. Richardson,* 397 U.S. 759, 771 (1970).

States have met their burden of providing competent defense counsel to indigent criminal defendants in two ways. The first is the appointment of private counsel from the practicing bar.[1] The second method is the establishment of public defender offices by counties or combinations of counties.[2] The involvement of the state and its political subdivisions in the creation, implementation, funding, and supervision of the public defender system means that the public defender necessarily acts with the power of the state and that both the public defender and his or her assistants act under color of law.

## A. THE INVOLVEMENT OF THE STATE UNDER THE IOWA PUBLIC DEFENDER ACT IS PERVASIVE.

The public defender office in Iowa is a statutory creation. Chapter 336A of the 1981 Code of Iowa is set out for the Court as Appendix A to Petitioner's brief.[3] The "Iowa Public Defender Act" authorizes county supervisors to establish or abolish the office of public defender. The

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[1]See, e.g. Section 815.7, Code of Iowa (1981).

[2]See e.g. Chapter 336A, Code of Iowa.

[3]The district court and the Court of Appeals took judicial notice of the Polk County, Iowa, ordinances which authorize the Polk County Offender Advocate's office. These ordinances merely implement the grant of authority conferred by Chapter 334A, Code of Iowa (1981). Petitioners do not essentially dispute this description of the Polk County Offender Advocate. See pages 3-5 Petitioner's brief.

supervisors may appropriate funds from the court fund and may accept money and other contributions from individuals and other public agencies for this office (Section 336A.2). The public defender is nominated by the district court judges of the county, and if appointed by the supervisors, serves for a six-year term (Section 336A.2).[4] The compensation of the public defender and his or her assistants is fixed by the board of supervisors (Section 336A.5). While the public defender may appoint "assistant attorneys, clerks, investigators, stenographers, and other employees", their compensation is also fixed by the supervisors (Section 336A.5). Similarly, the county supervisors provide office space, furniture, equipment and supplies for the public defender (Section 336A.9).

The duties of the public defender and his assisants are also carefully outlined in Chapter 336A. The public defender shall represent each "indigent" requesting counsel or on motion or order of the Court (Section 336A.2). "The determination of indigency shall be made by the public defender within criteria set out by the board of supervisors (Section 336A.4)." The public defender shall counsel and defend each person he represents at every stage of the proceedings against him and "prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice (Section 336A.6)." The supervisors may require the public defender and his assistants to refrain

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[4]Respondent will use the term "public defender" rather than "offender advocate" so as to maintain uniformity with Petitioner's brief.

from private practice (Section 336A.10) and the public defender may not recommend private lawyers (Section 336A.11). Finally, the public defender is required to make an annual report to the judges of the district court, the attorney general and the board of supervisors, "reporting all cases handled by him during the preceding year (Section 336A.7)."

This review of Chapter 336A evidences that local government dominates the office of the public defender. The role of the county supervisors includes: the initial decision to create the office, the selection of the public defender and his assistants, approval of salaries and budget of the office and its employees, the definition of "indigency", and review of the program on an annual basis. They may terminate the office by resolution of the board pursuant to Section 336A.1. The Court of Appeals below was surely correct when it held that an attorney in a county funded public defender's office acts under color of state law in representing indigent Defendants. The Court of Appeals was persuaded by the extent of the state involvement and succinctly stated its holding that the public defenders act under color of state law as stated at 628 F.2d 1106:

> All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by the attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point. Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them. In short, we are persuaded by the analysis, on this point, of *Robinson v. Bergstrom*, 579 F.2d 401, 404-08 (7th Cir. 1978) (per curiam).

In *Robinson v. Bergstrom, supra,* the Seventh Circuit found on identical facts to the instant case that the public defender acted under color of state law. The public defender in Illinois who was selected, compensated and appointed by the county to represent indigent criminal Defendants was found to be an "instrumentality" of the state and amenable to suit under 42 U.S.C. §1983, 579 F.2d 405.

## B. WHETHER THE PUBLIC DEFENDER EXERCISES INDEPENDENT JUDGMENT AND OWES HIS ALLEGIANCE TO HIS CLIENT IS NOT DISPOSITIVE OF ACTION UNDER COLOR OF LAW FOR §1983.

Petitioners make two main arguments as to why the public defender does not act under color of state law.[5] The first argument is that the public defender exercises judgment independent of the state in representing his client. This obligation is, of course, imposed upon all attorneys. The *Standards Relating to Defense Services,* approved by the American Bar Association in 1968 provided in §1.4 that defense counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice".[6] Petitioner's argument is not persuasive. This Court has routinely found that many individuals who exercise judgment independent of their status as a state official or instrumentality act under color of state law. Thus, prison administrators,[7] mental hospital directors,[8] school

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[5]Petitioners essentially concede the extensive state involvement in the public defender program (See Petitioner's Brief pp. 3-5).

[6]American Bar Association Project of Standards for Criminal Justice, *Standards Relating to Defense Services,* (1968), §1.4 at p. 6.

[7]*Procunier v. Navarette,* 434 U.S. 555 (1978).

[8]*O'Conner v. Donaldson,* 422 U.S. 563 (1975).

administrators,[9] and police officers[10] all act under color of state law. The simple fact that the public defender has some independence and can act with the same discretion enjoyed by any other attorney is simply not dispositive of the color of law issue.[11]

Petitioner's second argument is that once appointed, the public defender owes his sole loyalty to the client. (Petitioner's Brief pp. 30-41). This argument is largely irrelevant to the question at hand. In *O'Connor v. Donaldson,* 422 U.S. 563 (1975) a former mental patient brought suit under 42 U.S.C. §1983 against the state hospital superintendent and other members of his staff alleging an

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[9]*Wood v. Strickland,* 420 U.S. 308 (1975).

[10]*Pierson v. Ray,* 386 U.S. 547 (1967).

[11]Petitioner does not argue that the analysis of *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) is here appropriate. Indeed, *Jackson* is not cited as authority in Petitioner's brief. Respondent submits that the holding of *Jackson,* that there must be a "sufficiently close nexus between the state and the challenged action" is inappropriate in the instant factual context. When, as here, the public defender is an "instrumentality" of state government, the *Jackson* "nexus test" should not be applied. Several Circuit Court decisions agree: *Hollenbaugh v. Carnegie Free Library,* 545 F.2d 382 (3rd Cir. 1976) holding the state's extensive participation in the library program to make a *Jackson* analysis inapplicable; *Braden v. Univ. of Pittsburgh,* 552 F.2d 948 (3rd Cir. 1977) (en banc) holding the analysis of *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1962) to be applicable to a determination of state action; and *Chalfant v. Wilmington Institute,* 574 F.2d 739 (3rd Cir. 1978) (en banc) holding the status of the actor to be irrelevant if the institution upon whose behalf he acted is found to be an instrumentatlity of state or local government. Petitioner also relies on *Robinson v. Bergstrom,* 579 F.2d 401 (7th Cir. 1978) discussed at length in this brief. Respondent further submits that the analysis of *Burton v. Wilmington Parking Authority, supra,* is the proper one in this context.

intentional and malicious deprivation of his constitutional right to liberty. This Court did not even find it necessary to address the issue of whether the Defendant acted under color of law. Clearly, it was the status of Dr. O'Connor as director of the state hospital which triggered the state action necessary for the § 1983 action. Yet Dr. O'Connor owed his sole allegiance to his patient, Mr. Donaldson, and acted with discretion in treating his patient. The existence of the doctor-patient relationship did not negate the fact that the actions of the Defendant doctor were under color of law. Respondent submits that the doctor-patient relationship in *O'Connor v. Donaldson* is indistinguishable from the attorney-client relationship in the instant case. Quite simply, the existence of a professional relationship does not determine whether state action or action under color of law is present.

Petitioner's argument that the public defender's allegiance is solely to his client also evidences a simplistic and incorrect view of the criminal justice system. While a primary allegiance is to the client, there are many instances where the criminal defense attorney is ethically required to act in direct conflict with the interests of his client. The most obvious example is that when the defense attorney knows that his client is about to lie under oath, he must withdraw from the case. He may not participate in deceiving the Court.[12] The criminal defense attorney may reveal his client's intention to commit a crime, and must do so if the contemplated crime would seriously endanger the life or safety of any person or

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[12]ABA Standards for Criminal Justice: The Defense Function § 7.7 (1971).

currupt the processes of the Courts.[13] Winning isn't everything for the criminal defense lawyer. As stated by Chief Justice Burger:[14]

> I recall very well attending one of the meetings of the National Defender Project in which I have also been engaged for about the same period, when an enthusiastic young public defender got up and in the course of his discussion said, "The name of the game is to win." That's all very well if you're talking about the University of Minnesota football team because that's what the football team and fans think. If you are a candidate for governor or senator or president, that's true. The name of the game is to win. But the administration of criminal justice is a far more serious business, and the name of the game is not to win whether you are the prosecutor of the defense counsel.

The public defender owes to his client the responsibilities of an advocate. He owes to the criminal justice system the duty of preserving its integrity. His loyalty is mixed and sometimes in conflict. These dual responsibilities do not dispose of the color of state law issue in a public defender's representation of his indigent client.

Thus, Petitioner's focus on the professional relationship between the public defender and the indigent client is misplaced. Clearly, that relationship should strive to be the same as that between the privately retained attorney and his client. But there is a distinction, as noted by Chief Justice Burger:[15]

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[13]Id. Section 3.7

[14]Burger, "Counsel for the Prosecution and Defense — Their Roles under the Minimum Standards," 8 American Law Quarterly 1 (1969).

[15]Burger, Id. 6.

> I have already said that the defense counsel who is appointed by the court or is part of a legal aid organization, has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer. Having said that *we were compelled to recognize a reality. And that is that a defender establishment in a large city dealing with thousands of cases in a year, realistically is not quite in the same posture because the defendant does not pick his defense counsel.* His defense counsel is handed to him by the system, by society as it were. And so without ever at any point yielding on standards of ethical conduct, we recognize that there is a difference in some of the practical problems which confront a public defender. Time does not permit going into it, but it's important enough to mention, that we recognize the difference. The public defender has a more difficult task in securing and holding the confidence of his client. (Emphasis added)

The "reality" is precisely that recognized by the decision below and *Robinson v. Bergstrom* — the public defender is an employee and instrumentality of the state. For the indigent defendant the stakes are high. He has no voice in the selection of the attorney who will represent his interest.[16] The client is provided with the public defender by the State — the same party prosecuting him for a crime. The client is certainly justified in viewing the public defender's power as state power.[17]

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[16]See *Robinson v. Jordan,* 494 F.2d 793, 795 (5th Cir. 1974) (County health officer acted under color of state law where prisoner had no choice of doctor.)

[17]See, Note, "Liability of Public Defenders under § 1983, 92 Harvard Law Review 943, 947 (1979); and *Robinson v. Bergstrom,* 579 F.2d 401 (7th Cir. 1978).

## C. THE MUTUAL INTERDEPENDENCE OF THE STATE OF IOWA AND THE PUBLIC DEFENDER REQUIRE A FINDING THAT THE PUBLIC DEFENDER AND HIS ASSISTANT ACT UNDER "COLOR OF LAW".

It is, of course, an essential jurisdictional ingredient that the Defendant act under "color of statute, ordinance, regulation, custom, or usage" to state an action under 42 U.S.C. §1983. Respondent in his complaint alleges that Martha Shepard, an attorney in the public defender's office, deprived him of his right to counsel, inflicted upon him cruel and unusual punishment and arbitrarily denied him his statutory right to appeal. The Polk County Offer Advocate (public defender) and the Polk County Board of Srvisors, were alleged to be responsible for Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals.[18] Polk County was named as a Defendant, but was dismissed by the trial court and the Court of Appeals. The sole issue upon which Certiorari was sought and granted was the liability of the public defender.[19] A related question is the liability of the assistant public defender, Martha Shepard. In determining the color of law issue, we are embarking on a fact facting endeavor: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722 (1962).

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[18]These allegations must be gleaned from Respondent's Complaint. They should be liberally construed and assumed to be true at this pleading stage of the litigation. *Scheur v. Rhodes,* 416 U.S. 232 (1974).

[19]See Petition for Writ of Certiorari filed November 21, 1980.

The traditional definition of "color of law" is from *U.S. v. Classic,* 313 U.S. 299, 326 (1942): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of state law". As observed by this Court in *U.S. v. Price,* 383 U.S. 787 (1966), in cases under 42 U.S.C. § 1983, "the phrase 'under color of law' has consistently been treated as the 'state action' required under the Fourteenth Amendment." Respondent submits than an analysis of decisions by this Court and a review of the Iowa Public Defender Act program mandates a finding that the public defender and his assistant in the instant case acted under color of law.

In *Branti v. Finkel,* 445 U.S. 507 (1980) this Court considered the plight of two assistant public defenders who were summarily dismissed from their positions because of their political affiliation. This case held that the assistant public defenders as public employees enjoyed the protection of the First and Fourteenth Amendments of the U. S. Constitution. Jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). In *Branti,* then, the Court found that the action of the public defender in dismissing his two assistants was state action of sufficient breadth so as to satisfy the jurisdictional requirements of § 1983. The public defender in *Branti* acted under color of state law. The same result must follow in the public defender's representation of an indigent client.

The decisions of this Court clearly establish the doctrine that seemingly private conduct becomes state action if the private action is inextricably related to the state. Thus, in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1962) a private enterprise, the Eagle Coffee Shop, leased

property from the Wilmington (Delaware) Parking Authority. The building in which the coffee shop was located had been built with public funds for public purposes. The tenants refused to serve Negroes. While holding the actions of the tenant became state action, the Court stated at 365 U.S. 725:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Similarly, in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), this Court stated that activity by the state which "fosters or encourages" discrimination or creates a "symbiotic relationship" between private action and the state creates state action.[20] Also relevant is *Norwood v. Harrison,* 413 U.S. 455 (1973) holding that a state loan of textbooks to a private school with racially discriminatory admission policies warrants a finding of state action: "When, as here, that necessary expense is borne by the state, the economic consequence is to give aid to the enterprise; if the school engaged in discriminatory practices then the state . . . gives support to such discrimination." Id. at 464.

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[20]In *Moose Lodge,* the Court again engaged in a factual analysis of the relationship between the state and seemingly private action to determine the existence of State action or as the case held, that the issuance of a liquor license does not create state action.

This Court's most recent construction of the "under color of law" requirement of § 1983 is *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). Here, the Respondents were members of a regional planning agency for the development of Lake Tahoe, Nevada. Petitioners brought suit against the individual members of the planning agency and the agency itself under § 1983 alleging that Respondents' actions had destroyed the value of their property. The Respondents argued that they did not act under color of state law because formation of the Tahoe Regional Planning Agency (TRPA) required Congressional approval of an interstate Compact. While holding that an action under § 1983 could be maintained, the Court stated at 440 U.S. 399:

> The Compact had its genesis in the action of the compacting States, and it remains part of the statutory law of both States. The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the Counties. In discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them.

It is in the context of state involvement in the public defender program that the instant action must be weighed. Under Chapter 336A, the public defender is both nominated and appointed by the state. The county supervisors through the funding process determine the number of attorneys for the office, their compensation, the budget, the clerical staff, and require reports as to the activities of the office. The county supervisors under Section 336A.4 even retain the right to set criteria for indigency and thereby to determine

who is eligible for public defender represation. This political who is eligible for public defender representation. This political control over the persons the public defender is to represent and over the number of attorneys and support personnel in the public defender's office will surely affect the caseload of the office and thus dictate the amount of time to devote to each case. As a consequence, the state effectively influences decisions made by public defenders in a way it cannot influence those made by private attorneys.[21]

Unlike the situation in *Moose Lodge, supra,* the State's involvement in the public defender office does not end with the issuance of a license to practice law. The state's participation in the public defender office is pervasive. The relationship between the state and the public defender is "symbiotic", *Moose Lodge, supra.* The state fulfills its constitutional obligation of providing counsel to indigent criminal defendants by "fostering and encouraging" public defender offices. In discharging their duties and the state's responsibility, the county appointed and financed public defender has "also served the interests of the political unit that appointed them." *Lake Country Estates v. Tahoe Regional Planning Agency, supra.* The public defender becomes an instrumentality of the government which he serves and as such acts under color of law.

In summary, an analysis of Chapter 334A in light of contemporary standards of state action requires a holding that the public defender and his assistants act under color of law in their representation of indigent criminal defendants. The constitutional obligation of the state includes the provision of

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[21]See, Note "Liability of Public Defenders under § 1983 92 Harvard Law Review 943, 947 (1979).

effective counsel to vigorously pursue an appeal, *Anders v. California,* 386 U.S. 738 (1967). When as in the instant case, there has been an alleged deprivation of that right, the public defender and his assistants must be held liable for damages under §1983.

## II.

## AN ABSOLUTE IMMUNITY FROM SUIT UNDER §1983 IS NOT JUSTIFIED FOR THE PUBLIC DEFENDER AND THE PUBLIC INTEREST AND THAT OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY A QUALIFIED IMMUNITY.

Section 1983 states that "every person . . ." shall be liable to the party injured. The statute on its face admits of no immunities. Nevertheless, this Court and the lower federal courts have recognized various immunities necessary for the proper application of Section 1983. *Imbler v. Pachtman,* 424 U.S. 409 (1976), while holding that a state prosecuting attorney is absolutely immune from suit under §1983 proscribed a two-step analysis for the immunity issue: (1) a determination of the existence of a common law history of immunity and (2) an examination of "whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under §1983."

Since there were no public defenders prior to the enactment of §1983, the *Imbler* analysis is easily satisfied. The existing common law at the time of the enactment of Section 1983 held all attorneys responsible for their acts of

negligence, and a rule of no immunity might therefore seem required. The Court below, however, found that a qualified immunity was appropriate and Respondent is satisfied with that decision.

In *Ferri v. Ackerman,* 444 U.S. 193 (1979) the Court held that attorneys appointed pursuant to the Criminal Justice Act were not entitled to absolute immunity from malpractice claims as a matter of federal law. The Court below found the reasoning of *Ferri* to be applicable to the instant case based upon §1983 and granted to the public defender a qualified immunity from suit (628 F.2d 1107). Respondent submits that *Ferri* is dispositive of the issue and that the decision below is correct.

## A. THERE IS NO RELEVANT LEGISLATIVE HISTORY TO SECTION 1983, BUT THE COMMON LAW AT THE TIME OF THE STATUTE'S ENACTMENT RECOGNIZED THE LIABILITY OF ATTORNEYS TO THEIR CLIENTS.

The legislative history of Section 1983 is obviously of no value to this inquiry since public defenders were unknown at the time of the statute's enactment. There is no controlling common law precedent for the same reason. If then, the analysis of *Imbler v. Pachtman,* 424 U.S. 409 (1976), *supra,* is dispositive, the question must be resolved that the public defender enjoys no immunity.

This Court has suggested that the paucity of common law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. See *Wood v. Strickland,* 420 U.S. 308, 318-319 (1975); *Butz v. Economu,* 438 U.S. 478 (1978). Respondent suggests that the office of the public defender is without

common law precedent and he can find no better analogy than a private attorney. The common law is replete with instances of clients' actions of malpractice, negligence and breach of contract. See, e.g. *Pitt v. Yaldin,* 4 Burr. 2060, 98 Eng.Rep. 74 (K.B. 1767) (for representation in civil matter) *Stephens v. White,* 2 Va. 203 (1796) (civil); *Eccles v. Stephenson,* 6 Ky. 517 (1814) (civil); *Hatch v. Lewis,* 175 Eng.Rep. 1145 (N.P. 1861) (criminal); *Malone v. Sherman,* 49 N.Y.Super. 530 (1883) (criminal). Also see *Spring v. Costantino,* 362 A.2d 871, 879 (Conn. 1975) holding unanimously that a state public defender enjoys no common law immunity from state malpractice action.

Petitioners focus on the common law of defamation (Petitioner's brief pp. 44-52) is irrelevant. Dodson did not allege defamation in his complaint, and the issue is simply not before the Court in this case. Moreover, the same arguments were made in *Ferri v. Ackerman,* 444 U.S. 193 (1979) and were disposed of as being unpersuasive for the broad immunity there requested. See 444 U.S. 102, n.22.

## B. THE ROLE OF THE DEFENSE COUNSEL IN A CRIMINAL PROSECUTION WARRANTS THE DEFENSE OF ONLY A QUALIFIED IMMUNITY IN ACTIONS UNDER §1983.

Prior to this Court's decision in *Ferri v. Ackerman,* 444 U.S. 193 (1979) respectable authority held that the role of the judge, prosecutor, and defense counsel in a criminal prosecution were identical.[22] *Ferri* squarely held that the

[22]See, e.g. *Minns v. Paul,* 542 F.2d 899 (4th Cir. 1976); *Robinson v. Bergstrom,* 579 F.2d 401, 409-411 (7th Cir. 1978); *Miller v. Barilla,* 549 F.2d 648 (9th Cir. 1977).

judge, prosecutor and defense counsel are not part of an inseparable triumvirate:

> In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. *The primary rationale for granting immunity to judges, prosecutors and other public officers does not apply to defense counsel sued for malpractice by his own client.* (444 U.S. 204) (footnotes omitted) (emphasis added)

*Ferri* held that federal law did not mandate an absolute immunity for attorneys appointed under the Criminal Justice Act and sued in state Court.

Respondent submits that *Ferri v. Ackerman* is dispositive of the issue at bar. The Sixth Amendment guarantee of the right to counsel does not distinguish between a privately retained attorney or one supplied by the state. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19 (1956). There is little that is more critical in this respect than the right to the assistance of counsel. *Gideon v. Wainright,* 372 U.S. 335 (1963). Thus, the responsibilities of the attorney, whether privately retained, court appointed or a public defender must be the same. If federal law does not

mandate absolute immunity for an attorney appointed under the Criminal Justice Act, such a shield from accountability is not required for public defenders.

Furthermore, an analysis of this Court's decisions granting various immunities under §1983 indicates that only a qualified immunity is warranted. In *Pierson v. Ray,* 386 U.S. 547 (1967) absolute immunity was granted to judges based upon the doctrine "solidy established at common law that the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. 554. In *Imbler v. Pachtman,* 424 U.S. 409 (1976) this absolute immunity was extended to prosecutors by analogizing the role of the prosecutor to that of a judge (424 U.S. 422-23). In *Imbler,* it was stated at 424 U.S. 425:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

The *Imbler* decision further noted that the prosecutor enjoyed a long standing immunity at common law, and found that such immunity was still justified on public policy considerations. 424 U.S. 424. In a footnote, the Court developed the analogy between the role of the judge and prosecutor by noting that both exercise a discretionary judgment on the basis of evidence presented to them. (424 U.S. 423 no.20). In both *Pierson v. Ray* and *Imbler v. Pachtman* then, it was not the mere exercise of discretionary judgment that warranted an absolute immunity, rather than the unique public responsibilities of the judge and prosecutor in the criminal justice system justified the shield from §1983 liability.

Petitioners argue in their brief than an absolute immunity is required so that public defenders might exercise "independent professional judgment." (Petitioner's brief pp. 53-64). Yet, many public officials who exercise independent judgment enjoy only a qualified immunity from liability. Police officers,[23] prison officials,[24] state hospital superintendents,[25] school board members,[26] and state executive officers[27] all enjoy a qualified or good faith immunity under §1983. The argument that absolute immunity was necessary to protect the discretionary acts of these officials was rejected in each of these cases. As stated in *Butz v. Economu,* 438 U.S. 478, 505 (1978); "If, as the government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."[28] Petitioners in the instant action are making the same tired argument. They ask too much and the purported need for absolute immunity to protect discretionary acts should be rejected.[29]

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[23]*Pierson v. Ray,* 386 U.S. 547 (1967).

[24]*Procunier v. Navarette,* 434 U.S. 555 (1978).

[25]*O'Connor v. Donaldson,* 422 U.S. 563 (1975).

[26]*Wood v. Strickland,* 420 U.S. 308 (1975).

[27]*Scheur v. Rhodes,* 416 U.S. 232 (1974).

[28]*Butz v. Economu,* 438 U.S. 478 (1978) was not brought under 42 U.S.C. §1983 but was a direct action for violation of constitutional rights. The Court in *Butz* found §1983 cases persuasive by analogy. See 438 U.S. 496.

[29]A further flaw in Petitioner's argument should be noted. A shield of absolute immunity from federal liability would deprive Respondent of a federal remedy but would not encourage the free exercise of discretion since the public defender would assumedly be subject to civil liability in the state Courts. The imposition of malpractice liability for public defenders as an alternative to §1983 liability is suggested by Petitioners in their Brief (p. 100).

In summary, the decisions of the Court dictate the imposition of a qualified immunity for the public defender in the representation of his indigent client. The "principal responsibility" of the public defender is to "serve the undivided interest of his client." *Ferri v. Ackerman,* 444 U.S. 204 (1979). The defense counsel in thus distinguished from the judge and prosecutor who owe their primary responsibilities to the public. The decisions of this Court recognize that a qualified immunity is sufficient protection for discretionary acts by state officials and there are no compelling public policy reasons for granting an absolute immunity.

## C. THERE ARE NO COMPELLING PUBLIC POLICY CONSIDERATIONS WARRANTING PUBLIC DEFENDERS AN ABSOLUTE IMMUNITY FROM SUIT.

Petitioners in their brief advance at least seven policy considerations for the absolute immunity of public defenders: (1) recruitment of able lawyers, (2) heavy caseloads of public defenders and time "wasted" in defense of §1983 suits, (3) §1983 liability would dissuade public defenders from "confessing error", (4) collateral review of criminal convictions under §1983, (5) flooding federal courts with §1983 actions, (6) alternative sanctions are available for misconduct by public defenders, and (7) available alternatives to the client such as post-conviction relief or habeas. Each of these arguments will be addressed by Respondent. Respondent submits that the policy considerations have either been rejected by this Court in other contexts or are simply not sufficient reason to warrant an absolute immunity under Section 1983.

Petitioners argue that absolute immunity is required so that able lawyers are willing to serve as public defenders. (Petitioner's Brief

pp. 80-84). They further state that "this problem of recruitment will be nearly impossible to solve without absolute immunity . . ." (Petitioner's Brief p. 82). These arguments were rejected in *Ferri v. Ackerman,* where the Court noted the lack of empirical data to support the conclusion that the "risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation." *Ferri v. Ackerman,* 444 U.S. 200 n.17. Moreover, the empirical evidence available suggests there is presently a glut of lawyers, presumably competent, and available to serve as public defenders. See *Argersinger v. Hamlin,* 407 U.S. 25, 37 n.7 (1972); "Indeed, there are 18,000 new admissions to the bar each year — 3,500 more than are required to fill the estimated 14,500 average annual openings." The most recent figures indicate that there are 34,000 law school graduates in the class of 1981 and 26,400 legal jobs available.[30] As in *Argersinger* and *Ferri,* the argument that a lack of available lawyers militate against the protection of a criminal defendant's constitutional rights is factually incorrect.

The Petitioners argue that the defense of Section 1983 actions will divert attention from the chief responsibility of public defenders — defending criminal defendants (Petitioner's Brief, pp. 84-90). This concern has been rejected in a variety of suits against public officials including police officers, prison officials, state hospital superintendents, school board members, and the state executive officers.[31] This argument of time diverted to the defense of litigation was most emphatically rejected in *Butz v. Economu,* 438 U.S. 478, 506-507 (1978):

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[30]See, "Scrambling for Jobs in the J.D. Rat Race" The National Law Journal, Vol. III, No. 33, Page 1, April 27, 1981.

[31]See Notes 23 through 27, *supra.*

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U.S. at 250, 40 L.Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Ops 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger, and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

This statement is equally applicable to the instant case, and disposes of Petitioner's argument.

Petitioner's third argument is that Section 1983 liability would dissuade public defenders from "revealing weakness in the case or confessing error for a new trial". (Petitioner's brief p. 90-92).

Petitioners do not cite a single authority for this novel argument, nor do they cite a single case where a public defender or a criminal attorney has confessed error. Moreover, the perceived goal of encouraging public defenders to confess error would be adequately protected by a *qualified* immunity from liability. An absolute immunity should not be granted in the "absence of the most convincing showing that the immunity is necessary." *Imbler v. Pachtman,* 424 U.S. 409, 434 (1976) (White, concurring).

Petitioners assert that Section 1983 liability would encourage "collateral attacks on judicial proceedings." (Petitioner's brief pp. 93-95). This consideration is hardly a justification for absolute immunity from suit. A Section 1983 action would not be an attack on the underlying criminal conviction and an award of damages would not set aside the conviction. The proper response to a frivolous 1983 action is a motion to dismiss or a motion for summary

judgment as recognized in *Butz v. Economu, supra.* The possibility that a successful 1983 action for ineffective assistance of counsel may make it easier to set aside a state court conviction by post-conviction proceedings would mean only that the state court conviction should be set aside. As before, the remedy for this concern is the dismissal or summary judgment of non-meritorious suits.

Closely related to their other arguments is Petitioner's assertion that absolute immunity is necessary to prevent a flood of §1983 suits (Petitioner's brief, pp. 95-97). This argument has not found legitimacy in the opinions of this Court where immunity under Section 1983 has been requested and is an insufficient justification for absolute immunity in this case. The procedures available to a litigant through the Federal Rules of Civil Procedure will insure that the judicial investment of time is minimal. An absolute bar to valid lawsuits is not required for this legitimate concern.

The Petitioners argue that alternative sanctions such as disciplinary actions, judicial sanctions and criminal prosecutiions against a public defender merit an absolute immunity under §1983 (Petitioner's Brief pp. 97-101). To the indigent defendant, these remedies are more apparent than real. There is simply no body of developed case law or other authority to suggest that these sanctions against a public defender are sufficient to deter the ineffective assistance of counsel.[32] Moreover, a judicial or even criminal penalty against the public defender does not help the client. The basic purpose of Section 1983 liability is to "compensate

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[32]See Bines, "Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus," 59 Virginia Law Review 927, 972-75 (1973).

persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus,* 435 U.S. 247, 252 (1978). Petitioner's suggestion that alternative sanctions make §1983 liability unnecessary ignores this fundamental goal of compensation for the aggrieved party. This "policy consideration" by Petitioners is without merit.

Finally, Petitioners argue that §1983 liability is not necessary because alternatives such as habeas corpus or post-conviction relief ensures effective representation by public defenders (Petitioner's Brief, pp. 104-109). This argument overlooks that the essential purpose of Section 1983 is to provide compensation to an aggrieved person. *Carey v. Piphus,* 435 U.S. 247 (1978). It also incorrectly assumes that habeas and post-conviction provide an effective deterrent to ineffective representations of counsel. In both habeas and post-conviction, the result is a new trial — the attorney responsible for the ineffective representation receives no sanction at all. These remedies are purely retrospective and have virtually no deterrent effect on ineffective attorneys. Perhaps most importantly, these remedies have no deterrent effect at all when ineffectiveness results in harmless error thus denying habeas to a defendant. See *Chapman v. California,* 386 U.S. 18 (1967). The way to deter a lawyer (like most public officials) is by damages. Habeas and post-conviction relief are simply not effective.[33]

In summary, each consideration urged by Petitioners for the imposition of absolute immunity is without merit, or can

[33]See Bines, "Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus" 59 Virginia Law Review 927, 970-983 (1973) where the author cogently argues that habeas is ineffective and Section 1983 liability is necessary to ensure the effective assistance of counsel.

be remedied by motion practice authorized by the Federal Rules of Civil Procedure. Furthermore, the valid concerns of Petitioners are protected by a qualified immunity. A qualified immunity for public defenders is an appropriate compromise between the liability of a public defender under §1983 and the public interest in providing relief to indigent clients whose constitutional rights are violated.

### D. THE PUBLIC INTEREST, AND THE INTERESTS OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY GRANTING THE PUBLIC DEFENDER A QUALIFIED IMMUNITY UNDER 42 U.S.C. §1983.

The Court below determined that the public defender was as a matter of public policy, entitled to a qualified immunity from suit (628 F.2d 1108):

> Public defenders need the assurance that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity. *Wood v. Strickland,* 420 U.S. 308, 321, 95 S.Ct. 992, 1000 43 L.Ed. 2d 214 (1975). The defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intentions to injure his client. The touchstone is good faith. Id. at 322, 95 S.Ct. at 1000.

The definition of the qualified immunity below is clear and concise. It is easily understood by lawyers serving as public defenders. It is not different in substance from the requirement in *Wood v. Strickland,* 420 U.S. 308 (1975) that the school official knows the "unquestioned, con-

stitutional rights of his charges." Id. 322. It specifically adopts the "knew or reasonably should have known" language of *Wood v. Strickland* at 420 U.S. 322. Most importantly, it is a very fair standard to be applied to lawyers, who unlike school board members *do* possess a "unique competency in defining the law."[34] The qualified immunity from the decision below adequately protects the ability of public defenders to "exercise discretion in a forth right manner"[35] in the vigorous representation of their clients. It is a fair and reasonable compromise between the interests of society and the public defender and his client.

Two basic purposes of §1983 are to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" *Monroe v. Pape,* 365 U.S. 167, 174 (1961) and "to compensate persons for injuries caused by the deprivation of constitutional rights" *Carey v. Piphus,* 435 U.S. 247, 252 (1978). While it may be argued the Respondent has a remedy in the state courts of Iowa, that remedy is surely not available to him "in practice." Chapter 613A, Code of Iowa (1981) imposes liability for torts committed by "officers, employees, and agents acting within the scope of their duties."[36] Arguably, this waiver of sovereign immunity would include the breach of constitutional duties alleged in Respondent's complaint.

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[34]Applying this standard to lawyers should satisfy the concern of four members of this Court who in *Wood v. Strickland,* sought a lesser standard for qualified immunity based upon the "good faith" requirement of *Scheur v. Rhodes,* 416 U.S. 232, 247-248 (1974) at 420 U.S. 328-331 (Powell dissenting).

[35]*Wood v. Strickland,* 420 U.S. 320 (1975).

[36]Section 613A.7, Code of Iowa (1981).

Respondent asks this Court to judicially notice the practical barriers to his successful suit under this statute: He is indigent and incarcerated. He is certainly unable to hire a lawyer on an hourly basis and a contingent fee arrangement is not attractive to private attorneys.[37] A lawyer will not be appointed for him as in the instant case under Section 1983. He is uneducated in the law and may not even be permitted to attend crucial discovery proceedings or a civil trial. Perhaps most importantly, he must commence suit within six months or give a detailed notice to the County within sixty days.[38] It is very unlikely, as a practical matter, that indigent criminal defendants (usually incarcerated) would be able to overcomee these obstacles.[39] Furthermore, suit must be filed in the same county where the defendant resides[40] — in this context the same county that funds the public defender. A substantial damages award is unlikely especially when the plaintiff must proceed without counsel. For all of these reasons, Respondent submits that his state remedy, if one exists, is simply not a "practical alternative" available to him.[41]

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[37]Attorney fees can be awarded for a successful 1983 action under 42 U.S.C. §1988, and a qualifying plaintiff may proceed *in forma pauperis.* There are no such provisions in Chapter 613A.5, Code of Iowa (1981).

[38]Section 613A.5, Code of Iowa (1981).

[39]Respondent has not complied with the notice requirements of Section 613A.5.

[40]Section 616.3(2), Code of Iowa (1981).

[41]While not relied upon by Petitioners in their brief, Respondent is aware of this Court's recent decision in *Parratt v. Taylor,* 40 U.S.L.W. 4509 (May 19, 1981). This case involved an action under § 1983 for the negligent loss of a hobby kit valued at $23.50. The Court held that Respondent had not alleged a sufficient due process deprivation of his property in that the Nebraska Tort Claims procedure was adequate.

*(continued)*

Section 1983 was enacted to aid in "the preservation of human liberty and human rights." *Owen v. City of Independence,* 445 U.S. 622 (1980). The statute, as remedial legislation, is to be construed generously to further its primary purpose. Id., at 636. That purpose, as often recognized by this Court, is to provide a federal damages remedy for the deprivation of constitutional rights. *Carey v. Piphus,* 435 U.S. 247 (1978); *Gomez v. Toledo,* 444 U.S. 1031 (1980). Respondent has specifically alleged a deprivation of a fundamental constitutional right — the right to counsel guaranteed by the Sixth and Fourteenth Amendments. He has thus met the first inquiry in a § 1983 case, see *Martinez v. California,* 445 U.S. 920 (1980); *Baker v. McCollan,* 443 U.S. 507 (1980). His allegations, if proven, would entitle him to damages.

Petitioners would deny Respondent his day in court by a grant of absolute immunity. As seen, this shield from accountability cannot be justified on public policy considerations. The goal of encouraging the effective representation of indigent defendants will be promoted by making public defenders liable for damages, and the grant of a qualified immunity will protect the legitimate concerns advanced by Petitioners. A qualified immunity will give Russell Dodson his day or hour in court. The Petitioners have the burden of pleading their defense of qualified

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*(footnote continued from preceding page)*

Respondent in the instant case does not allege a property deprivation but a denial of his constitutional right to effective representation of counsel. It would simply make no sense to find that a public defender's denial of this constitutional right is not a deprivation of a "right . . . secured by the Constitution . . ." under 42 U.S.C. § 1983. *Parratt v. Taylor,* should therefore be limited to a deprivation of property without due process of law. See White (concurring) at 49 U.S.L.W. 4513: "I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty."

immunity, *Gomez v. Toledo,* 444 U.S. 1031 (1980), and they can move for summary judgment, if appropriate. The case may be dismissed, and Petitioners' investment of time will be negligible. If, however, the case has merit, then the imposition of a qualified immunity will enable Respondent to recover the damages he is entitled to under §1983. Whether Respondent is entitled to an hour in court on a Motion for Summary Judgment or a day in recovering damages is not the issue before this Court—§1983 will again aid in the "preservation of human liberty and human rights." *Owen v. City of Independence,* 445 U.S. 622 (1980).

In summary, Respondent's complaint should be heard and determined by a jury in federal court. No compelling reason has been established that entitles the public defender to an absolute immunity, and the qualified immunity defined in the court below is the proper balance between the competing interests of the public defender's unfettered representation of his client and the client's need for redress of his grievance. "Any lesser standard would deny much of the promise of §1983." *Wood v. Strickland,* 420 U.S. 308, 322 (1975).

## CONCLUSION

For all of the reasons advanced in this Brief and Argument, Respondent respectfully prays that the decision of the Circuit Court be affirmed in all respects.

/s/ John D. Hudson

*Court-appointed Counsel*
*For Respondent*

No. 80 - 824

Office - Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners.*

*VS.*

RUSSELL RICHARD DODSON,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. § 1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. § 1983 for actions taken while representing such indigent clients.

Index

Page

II. Absolute Immunity from §1983 Liability Is Justified for Public Defenders; the Public Interest and the Interests of the Public Defender and his Client are Best Served by a Grant of Absolute Immunity Rather than a Qualified Immunity. . . . . 16

A. The Lack of a Common Law History of Immunity Does Not Necessarily Prevent Its Extension to Public Defenders; Public Policy Considerations Similar to Those Underlying the Common Law Immunity For Judges and Prosecutors Support a Rule of Absolute Immunity For Public Defenders Under §1983 . . . . . 16

B. The Supreme Court's Decision in Ferri v. Ackerman is Not Dispositive of the Issue at Bar, and Is Not Authority for the Proposition that Absolute Immunity is Not Justified for Public Defenders Under §1983 . . 30

C. The Role of the Public Defender in the Criminal Justice System is Not Adequately Protected by a Grant Of A

## TOPICAL INDEX


| | Page |
|---|---|
| Argument. . . . . | 1 |
| I. County Employed Public Defenders Do Not Act Under Color of State Law Within the Meaning of 42 U.S.C. §1983 During the Course of Representing Indigent Criminal Defendants. . . . . | 1 |
| A. The Activities of the Public Defender Challenged Herein Do Not Constitute State Action Since Polk County Did Not Significantly Foster or Encourage the Particular Conduct, and Does Not Involve or Entertwine Itself in the Actual Representation of Indigent Persons by Public Defenders . . | 1 |
| B. The "Functional Test" Proposed by AMICI NLADA and the National Association of Criminal Defense Lawyers Should Not Be Considered by the Court . . . . . | 13 |

Index Page

Qualified Immunity For Actions Brought Under 42 U.S.C. §1983; A Rule of Absolute Immunity is Necessary To Protect Public Defenders From Dissatisfied Indigent Clients. . . . . 37

Conclusion. . . . . 45

TABLE OF CASES AND AUTHORITIES CITED

Cases

Barr v. Matteo, 360 U.S. 564 (1959) 36

Bivens v. Six Unknown Named Agents, 422 U.S. 563 (1978) . . . . . 40

Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1872). . . . . 18, 19, 29

Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) . . . . . 22, 26 28, 35

Brown v. Schiff, 614 F.2d 237 (10th Cir. 1980). . . . . 28

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). . 2, 3, 4, 8, 9

Butz v. Economou, 438 U.S. 478 (1978). . . . . 42

Index


| | Page |
|---|---|
| California v. Taylor, 353 U.S. 553 (1957) | 15 |
| Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976) | 6, 10 |
| Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) | 40 |
| Driscoll v. International Union of Operating Engineers, Local 139, 484 F.2d 682 (7th Cir. 1973) | 10 |
| Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977) | 40 |
| Eckerd v. Indian River School District, 475 F.Supp. 1350 (D. Del. 1979) | 41 |
| Ferri v. Ackerman, 444 U.S. 193 (1979) | 30, 31, 32, 33, 34, 35, 36 |
| Fujiwara v. Clark, 477 F. Supp. 822 (D. Hawaii 1979) | 41 |
| General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) | 15 |
| Gideon v. Wainwright, 372 U.S. 335 (1963) | 21, 22 |

Index


| | Page |
|---|---|
| Gomez v. Toledo, __U.S.__, 100 S.Ct. 1920 (1980) . . . . . | 41 |
| Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979) . . . . . | 28 |
| Imbler v. Pachtman, 424 U.S. 409 (1976). . . . . | 16, 17, 18, 20, 21, 22, 23, 29, 35, 39 |
| Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). . . . . | 5, 6, 9 |
| Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975) . . . . . | 39 |
| McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) . . . . . | 41 |
| Miller v. Barilla, 549 F.2d 649 (9th Cir. 1977) . . . . . | 28, 35 |
| Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). . . . . | 22, 25, 26, 28, 35 |
| Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) . . . . . | 4, 5, 8, 9, 12 |

Index


| | Page |
|---|---|
| O'Conner v. Donaldson, 422 U.S. 563 (1975) . . . . . | 40 |
| Ohland v. City of Montpelier, 467 F.Supp. 324 (D. Vermont 1979). . | 39 |
| Pierson v. Ray, 386 U.S. 547 (1967) . . . . . | 17, 18 |
| Player v. State of Alabama, Dept. of Pen. and Sec., 400 F.Supp. 249 (D. Ala. 1975) . . . . . | 9 |
| Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968) . . . . . | 7 |
| Reitman v. Mulkey, 387 U.S. 369 (1967) . . . . . | 5 |
| Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). . . . . | 22, 28, 35 |
| Scheur v. Rhodes, 416 U.S. 232 (1974) . . . . . | 39, 40 |
| Shelley v. Kraemer, 334 U.S. 1 (1948) . . . . . | 1 |
| Tenney v. Brandhove, 341 U.S. 367 (1951) . . . . . | 18 |
| Tyrrel v. District of Columbia, 243 U.S. 1 (1917). . . . . | 15 |
| Tyrrell v. Speaker, 535 F.2d 823 (3rd Cir. 1976). . . . . | 41 |

Index — Page

Washington v. Davis, 426 U.S. 229 (1976) . . . . . 7

Wood v. Strickland, 420 U.S. 308 (1975) . . . . . 43

Statutes

18 U.S.C. Section 3006A (1976) . . 30

42 U.S.C. Section 1983 . . . . . passim

Texts and Reports

Bruggeman, Criminal Justice for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Law Quarterly 2 (1969) . . . . . 33

Burger, Criminal Justice Act of 1964 - State Malpractice Suit Against Appointed Counsel, Ferri v. Ackerman, 13 Akron Law Review 745 (1980) . . . . . 34

Kurland and Casper, The Supreme Court Review 1980 (1st Edition 1980) . . . . . 43

## ARGUMENT

### I

### COUNTY EMPLOYED PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW WITHIN THE MEANING OF 42 U.S.C. §1983 DURING THE COURSE OF REPRESENTING INDIGENT CRIMINAL DEFENDANTS.

#### A. THE ACTIVITIES OF THE PUBLIC DEFENDER CHALLENGED HEREIN DO NOT CONSTITUTE STATE ACTION SINCE POLK COUNTY DID NOT SIGNIFICANTLY FOSTER OR ENCOURAGE THE PARTICULAR CONDUCT, AND DOES NOT INVOLVE OR ENTERTWINE ITSELF IN THE ACTUAL REPRESENTATION OF INDIGENT PERSONS BY PUBLIC DEFENDERS.

The threshold question in determining federal jurisdiction under the Civil Rights Act is whether sufficient state action is present to remove the challenged activity from the sphere of private action which is beyond the reach of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1 (1948). There is no clear-cut method of answering this question, since, due to the variety of governmental activities, state action can be assessed only in the framework of the particular

circumstances and facts before the Court. Burton v. Wilmington Parking Authority, 365 U.S. 715, at 725-26 (1961). Respondent Dodson and amicus curiae United States contend that the involvement of the state and Polk County in the implementation, funding, and supervision of the public defender system means that public defenders act under color of state law for the purposes of §1983. (Respondent's Brief, p. 5); (United States' Brief, p. 7). Polk County suggests that §1983 is not applicable simply because private choices are enabled to be carried out because of the backing of the state, and that where the impetus for the alleged deprivation is private the state must have significantly involved itself with the violation for §1983 to apply.

Numerous tests have been employed to

determine whether a person acts under color of state law for the purposes of the Civil Rights Act. In a pioneer decision on the question of state action, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Supreme Court emphasized that only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance, and that the fashioning and applying of a precise formula for recognition of state responsibility is an impossible task.[1] In Burton, supra, the Court relied on the fact that a state agency had so far insinuated itself into a position of interdependence with the discrimination practiced by a private party that it had to be recog-

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[1] Burton v. Wilmington Parking Authority, 365 U.S. 715, at 722 (1961).

nized as a joint participant in the challenged activity, which, therefore, could not be considered so purely private as to fall outside the scope of the Fourteenth Amendment.[2] The key factor in the decision was the "symbiotic" or mutually beneficial relationship between the otherwise private party and the state.

More recently, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Supreme Court expounded further upon the state action question, and held that only involvement which supports and promotes the challenged conduct, or the activity in the course of which the challenged denial of rights occurred, justifies the attachment of constitutional standards. In rejecting a "state

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[2] Burton, supra, at 725.

action" claim, the Court observed:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations', Reitman v. Mulkey, 387 U.S. 369, 380 . . . (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."
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> Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 173 (1972).

The limits of the theory were most recently explored by the Supreme Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), involving a public utility's allegedly improper termination of service to a customer. In suggesting that the action in question must have been associated traditionally with

sovereignity or the exclusive prerogative of the state to constitute state action[3], the Court said that state action requires that there be a "sufficiently close nexus" between the state and the challenged activity for the activity to be attributed to the state itself for the purposes of §1983. Jackson, supra, at 351. In other words, it must be determined whether the action can "be fairly treated as that of the state itself".[4]

The Supreme Court has thus made clear that neither general government involvement nor even extensive state regulation is sufficient for a finding of state action.[5] Not all government

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[3] Jackson v. Metropolitan Edison Co., 419 U.S. 345, at 352-353 (1974).

[4] Jackson, supra, at 351.

[5] Cannon v. University of Chicago, 559 F.2d 1063, at 1069 (7th Cir. 1976).

involvement in private activity, then, is constitutionally meaningful and of such a nature as to justify the imposition of constitutional limitations. Only government support or promotion calls forth constitutional obligations. A finding of state action requires the state to affirmatively support and be directly involved in the specific conduct which is being challenged.[6]

Respondent Dodson and amicus United States direct their argument to suggesting that the public defender's activities constitute state action since the office is funded directly by the county, and because the function which public defenders fulfill (the defense of indigent criminal defendants) constitutes an

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[6] See, Washington v. Davis, 426 U.S. 229 (1976); Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968).

essential state function under the Sixth Amendment.[7] The contention is that the physical and financial ties between the state and the public defender's office makes them inextricable partners in a joint effort.

However, this theory falls short of its intended mark when compared to the proposition offered and decisively rejected in the Moose Lodge decision. The finding of financial involvement and an exchange of benefits does not automatically make the result in Burton, supra, applicable.[8] The office of the public defender and the county cooperate closely in working toward a shared goal, but they are not so closely tied together as to be considered "joint venturers."[9]

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[7] Respondent's Brief, p. 21; United States' Brief, p. 15.

[8] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 173 (1972).

[9] Moose Lodge, supra, at 177.

While clearly concerted action, or closely entertwined conduct, of state officials and private parties may establish sufficient state involvement to satisfy §1983 jurisdictional requirements, the county's involvement in the public defender's activities herein does not approach the level of entanglement that requires this Court's reaching the Burton result.

The ultimate question, as refined by Moose Lodge and Jackson, under any and all of the state action theories, is whether the state, through regulation, financial assistance, or any other action, "can be said to have sanctioned, fostered, encouraged or identified itself" with the specific practices at issue.[10] The Supreme Court has made

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[10] Player v. State of Alabama, Dept. of Pen. & Sec., 400 F.Supp. 249, at 263 (D. Ala. 1975).

clear that the governmental involvement necessary to meet the "state action" requirement under §1983 must be "affirmative support measured by its direct contribution to the conduct at issue." Cannon v. University of Chicago, 559 F.2d 1063, at 1070 (7th Cir. 1976). To be regulable under constitutional standards through §1983, the private activity which a plaintiff challenges must be supported by state action that significantly fosters or encourages that activity. Driscoll v. International Union of Operating Engineers, Local 139, 484 F.2d 682, 690 (7th Cir. 1973).

In the matter at hand, Polk County has lent significant support to the operation of the public defender's office; it cannot, however, be found to have encouraged or given support to the specific practices challenged herein.

Indeed, Mr. Dodson's complaint contains no allegation that Polk County affirmatively supported or expressly approved of any of those specific practices challenged herein, or even had actual knowledge of the alleged deprivation of rights. Nor has Mr. Dodson established that the county made it a practice to intervene in any significant way with the internal operations of the pulbic defender's office with respect to the actual representation of indigents. On the other hand, it is noteworthy that Polk County plays no significant role in the policy-making of the public defender's office. Aspects of the operation which relate directly to the representation of indigents are left to the discretion of the office's management, much as government contractors are left free to manage their own affairs so long as they pro-

vide the services for which they have contracted. Polk County in no way controls the office's actual representation of clients to the extent it is a "joint venturer" in the enterprise.[11]

Although the Polk County Offender Advocate's Office has undertaken to make available to indigents legal services which the Constitution compels local governments to provide, its history, organization and management definitely establish that it is a private actor within the jurisdictional confines of §1983. Under its charter, Polk County retains a minimum of control over it, and the office's obligation is to its clients and not to the county. In this case, where there appears to be no state

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[11] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, at 176-77 (1972).

encouragement or support of the specific conduct being challenged, and where there is no indication that the state exercises any significant control over the actual representation provided indigents by public defenders, it would be improper to divest the Offender Advocate Office of its private character.

B. THE "FUNCTIONAL TEST" PROPOSED BY AMICI NLADA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SHOULD NOT BE CONSIDERED BY THE COURT.

In their amici brief filed herein, the NLADA and the National Association of Criminal Defense Lawyers urged the Court to adopt a functional test in determining whether or not public defenders act under color of state law for §1983 purposes. Under such a test, "the actions, or functions, of the public defender, rather than the role or position occupied, would determine whether

the jurisdiction of the Court can be invoked because the wrongdoing occurred under color of state law." The above-mentioned amici request the Court to rule that public defenders do not act under color of state law while in the course of individual client representation, but do act under color of state law where the alleged wrong is committed pursuant to policies of office administration, a supervisory authority, or a funding source.

The proposed functional test of the amici is beyond the scope of the questions presented to the Court. The Court has been asked to pass solely upon the question of whether public defenders act under color of state law in the course of representing indigents. Whether or not administrative practices or supervisory involvement bring a defender's

conduct within the "state action" requirement is not an issue the Court has been requested to decide, and was not litigated in the Eighth Circuit below. In general, counsel may not add to the substance of the questions previously assigned or specified, and the Court will limit its consideration of the case "to the questions specifically brought forward by the petition". General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 177-78 (1938). Those questions must, in addition, properly arise in the record, Tyrrel v. District of Columbia, 243 U.S. 1 (1917), and must have been urged and briefed in the court below. California v. Taylor, 353 U.S. 553, 557 note 2 (1957). Since this Court is limited to the issues presented in the Petition and in the Court below, the proposed test of the amici should not be considered by it.

## II

## ABSOLUTE IMMUNITY FROM §1983 LIABILITY IS JUSTIFIED FOR PUBLIC DEFENDERS; THE PUBLIC INTEREST AND THE INTERESTS OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY A GRANT OF ABSOLUTE IMMUNITY RATHER THAN A QUALIFIED IMMUNITY.

### A. THE LACK OF A COMMON LAW HISTORY OF IMMUNITY DOES NOT NECESSARILY PREVENT ITS EXTENSION TO PUBLIC DEFENDERS; PUBLIC POLICY CONSIDERATIONS SIMILAR TO THOSE UNDERLYING THE COMMON LAW IMMUNITY FOR JUDGES AND PROSECUTORS SUPPORT A RULE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER §1983.

Only after state action is found is it appropriate to consider the possibility of a grant of immunity to an official. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court extended absolute immunity under §1983 to public prosecutors, and in so doing clarified the appropriate method to determine immunity under that statute. The Court, stating that §1983 "is to be read in harmony with general principles

of tort immunities and defenses"[12], provided a two-part test for determining whether a given party enjoys immunity, and if so, the scope of the protection: (1) whether the relevant official or his counterpart by analogy enjoyed common law immunity, absolute or qualified, and (2) whether policy considerations similar to those underlying common law immunity warrant any immunity under §1983.[13]

In his Brief, Mr. Dodson has taken the position that since the office of public defender is without any common law precedent, the first prong of the Imbler test is dispositive and public defenders should enjoy no absolute immunity. (Respondent's Brief, p. 23). However, while recognizing that Pierson v.

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12 Imbler v. Pachtman, 424 U.S. 409, at 418 (1976)

13 Imbler v. Pachtman, 424 U.S. 409, at 421-424 (1976)

Ray, 386 U.S. 547 (1967), and Imbler v. Pachtman, 424 U.S. 409 (1976), rest in large part on the extension of common law principles in granting complete immunity to judges and prosecutors, Polk County asserts that the absence of a common law history of immunity for public defenders does not dictate a finding that absolute immunity should not be granted such defenders.

The extension of absolute immunity to legislators[14], judges and prosecutors was justified by both a significant common law history and obvious public policy considerations. Thus, in Pierson v. Ray[15], supra, the Supreme Court relied upon its decision in Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1872),

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[14] Tenney v. Brandhove, 341 U.S. 367 (1951).

[15] Pierson, supra, granted judges absolute immunity from actions brought under 42 U.S.C. §1983.

for not only an historical analysis of the common law immunity granted judges, but also for an in-depth discussion of social considerations underlying that immunity. In Bradley, supra, the Court emphasized five factors that in its view justified an absolute immunity for judges:

1. The need for a judge to "be free to act upon his own convictions, without apprehension of personal consequence to himself";

2. the controversiality and importance of the competing interests adjudicated by judges and the likelihood that the losing party would feel aggrieved and wish to challenge the decision maker;

3. the self-protective "record keeping" to which judges would be driven in the absence of absolute immunity;

4. the availability of alternative remedies, such as appeal and impeachment, for judicial wrongdoing; and

5. the ease of alleging bad faith, which would then require "the same vexatious litigation upon such allegations."[16]

[16] Bradley v. Fisher, 80 U.S. (13 Wall) 335, at 347-354 (1872).

In Imbler, supra, the Court extended absolute immunity under §1983 to prosecutors for very similar reasons as it awarded immunity to judges. Again, the Court heavily stressed the considerations of public policy underlying prosecutorial immunity. Six factors were found to justify a grant of absolute immunity to prosecutors faced with §1983 suits:

1. The concern that harassment from §1983 litigation "would cause a deflection of the prosecutor's energies from his public duties";

2. the possibility that §1983 liability would cause prosecutors to shade their decisions instead of exercising the independence of judgment required by their public trust;

3. the fear that §1983 liability "would open the way for unlimited harassment and embarrassment of the most conscientious prosecutors";

4. the recognition that public trust in prosecutors' offices would suffer if they were constrained in making every decision by the consequences of potential liability in a suit for damages;

5. the fact that the presentation of complex issues in a §1983 action would often require "a virtual retrial of the criminal offense in a new forum", and the resolution of technical matters by a lay jury; and

6. the availability of a number of post-trial procedures for the allegedly wronged criminal defendant, including the remedial powers of the trial judge, appellate review, and state and federal post-conviction remedies.[17]

As seen, the extension of absolute immunity by the Supreme Court to judges and prosecutors was based on a common law history of immunity and obvious social considerations. There is, of course, no traditional immunity for a public defender since the job is not a traditional one; the obligation of the federal government and the states to provide counsel to indigent defendants is a recent outgrowth of the case of Gideon v. Wainwright,

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17 Imbler v. Pachtman, 424 U.S. 409, at 423-427 (1976).

372 U.S. 335 (1963). As a result, the common law analysis test of Imbler, supra, cannot be utilized to determine whether public defenders should be accorded absolute immunity under §1983.

However, the lack of a common law history of immunity should not necessarily prevent its extension to public defenders.[18] Although utilized as an important inquiry, the first prong of the Imbler test cannot reasonably be set forth as a mandatory requirement.[19] Indeed, the Imbler opinion placed its greatest emphasis upon the public policy considerations underlying the common law immunity for prosecutors.[20] It is there-

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[18] Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978).
Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).
Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972).

[19] Robinson v. Bergstrom, 579 F.2d 401, 409 (7th Cir. 1978).

[20] Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976).

fore necessary, under the Imbler analysis, to turn to the second level of inquiry, more heavily stressed by the Supreme Court, involving considerations of public policy. In so doing, it is inescapable that justification for an absolute immunity for public defenders is predicated upon analogy and social considerations.

The proper analysis is to look at the Court's justification for judicial and prosecutorial immunity to identify factors that the Court regards as justifying absolute immunity for officials. And when one does that, one cannot help but be struck by the extent to which those factors justify no less an immunity for public defenders than for judges and prosecutors.

Indeed, public defenders, no less than judges, must be free to act object-

ively and without regard to personal considerations. There is no reason to believe that those defendants who are convicted and sentenced are any less aggrieved or disposed to challenge the adequacy of the legal representation of their public defender than to bring suit against their trial judge. The "record-building" response to fear of liability is not limited to judges; undoubtedly, it is a particular temptation for all officials allotted only a qualified immunity. The array of alternative remedies available to correct public defender misconduct is just as broad as those available for judicial wrongdoing. And a plaintiff's ease in alleging bad faith in a §1983 complaint - and getting to trial on the issue - is at least as great with respect to public defenders as it is with judges.

Like the prosecutor, the public defender needs freedom to make difficult decisions, such as when to decline to press frivolous claims and how to best make strategic decisions as to a particular defendant.[21] The constant threat of disappointed indigents pressing §1983 actions against public defenders would have a chilling effect upon their decision-making. The defense of even frivolous §1983 suits would consume the energy of state subsidized attorneys which would better be devoted to representing the interests of their clients. Because the state pays for the services of the public defender, there are no economic brakes on an indigent's demands to pursue an appeal or related action. The threat of §1983 liability might well

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[21] Minns v. Paul, 542 F.2d 899, 901 (4th Cir. 1976).

force public defenders to abandon their good judgment and pursue such frivolous suits on appeal.[22] Finally, as in the case of the public prosecutor, an award of absolute immunity to public defenders would not deprive a defendant of all redress, since he has the alternative remedies of direct appeal, state post-conviction relief, or federal habeas corpus.[23]

When one contrasts the circumstances under which the decisions of public defenders must often be made (momentarily; with broad discretion and little guidance or information; under great stress and uncertainty; in potentially unfriendly surroundings; and under severe resource constraints) with those under which judges render decisions (at

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[22] Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976).

[23] Brown v. Joseph, 463 F.2d 1046, 1049 (3rd Cir. 1972).

their own pace; with discretion narrowed and guidance provided by precedent and statutory language; with voluminous records and briefs; enjoying great deference; in friendly and familar surroundings; and able to treat time and information as "free goods"), it is difficult to resist the conclusion that §1983 suits against public defenders are more likely to be brought and to prevail than in the case of judges. A similar analogy can be made with the situations of public prosecutors. If the merest possibility that judges and prosecutors will be sued suffices to justify absolute immunity for them - and the Court has taken the opinion that it does - it remains tc be demonstrated why a higher risk to public defenders justifies anything less.

To date, four out of the five Circuits which have squarely addressed the issue

of whether a public defender is absolutely immune from §1983 liability have decided in the affirmative. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977). Furthermore, both the Second Circuit and the Tenth Circuit, while not specifically deciding the issue, have cited with approval those cases finding public defenders absolutely immune under the Civil Rights Act.[24] The Eighth Circuit below is the lone exception. The accepted rationale for such grants of absolute immunity has been that public defender activities in representing an

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[24] Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979); Brown v. Schiff, 614 F.2d 237 (10th Cir. 1980).

indigent defendant are as closely associated with the judicial process as are prosecutors and judges, and the policy considerations underlying prosecutorial and judicial immunity enunciated in Imbler, supra, and Bradley, supra, are equally important in the case of public defenders. The public in general, and the criminal defendant in particular, will suffer from any rule that would cause the public defender to gauge his conduct by the possibility that the client could bring a §1983 action against him if he were dissatisfied with the outcome of his trial. The inhibiting effect it would have on the public defender's management of a criminal defense would far outweigh any social utility of allowing a §1983 action for damages against the defender.

B. THE SUPREME COURT'S DECISION IN FERRI V. ACKERMAN IS NOT DISPOSITIVE OF THE ISSUE AT BAR, AND IS NOT AUTHORITY FOR THE PROPOSITION THAT ABSOLUTE IMMUNITY IS NOT JUSTIFIED FOR PUBLIC DEFENDERS UNDER §1983.

The Supreme Court recently considered the immunity question, although not in a §1983 context, for appointed defense counsel in Ferri v. Ackerman, 444 U.S. 193 (1979). There, the Court ruled that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice action brought against him by a former client. The Respondent submits that the fact that federal law did not mandate an absolute immunity for attorneys appointed pursuant to the Federal Criminal Justice Act[25] and sued in a state tort action·

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[25] Criminal Justice Act of 1964, 18 U.S.C. §3006A (1976).

is dispositive of the issue herein. (Respondent's Brief, p. 25).

Polk County takes issue with such a conclusion. The very narrow issue presented to the Court in Ferri, supra, was whether federal law in any way preempts the freedom of a state to decide the question of immunity in accordance with its own laws.[26] The specific inquiry was whether federal law requires a state to accept the defense of immunity in a state malpractice action. In answering this question in the negative, the Court noted that while the legislative history of the Act revealed a desire to compensate appointed counsel, it did not indicate an intent to federalize such lawyers.

Ferri, supra, is quite distinguishable from the case at bar. The Supreme Court's analysis regarding an appointed

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[26] Ferri, supra, at 197.

attorney's immunity in a state malpractice action does not apply by analogy to the situation herein. The distinctions are obvious. The public defender is not in the same situation as the private lawyer in Ferri, appointed to represent an indigent in a single federal criminal trial; he is an individual whose sole duty it is to fulfill the state's responsibility to provide free legal assistance to indigents accused of committing crimes, and who deals with hundreds of such cases every year. The unique nature of the relationship between the public defender and his client provides a compelling justification for treating the public defender differently from the private attorney appointed in Ferri. Section 1983 actions against public defenders, significantly the suit at hand, are essentially tort ex contractu

claims, and can just as easily be brought in state court in either tort or contract. It is important, then, to recognize that the public defender, unlike his privately appointed counterpart in Ferri, is not free to contract in any way with his client. Notably, the public policy considerations supporting absolute immunity for public defenders (recited in Section II-A of this Reply Brief) are simply not as compelling when applied to a private attorney appointed by the Court to partake in a single criminal trial. And, as the Chief Justice has noted, "the public defender has a more difficult task in securing and holding the confidence of his client" than private counsel. Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 2, at 6 (1969).

In addition, Ferri's inquiry was narrowed to the pragmatic confines of what present federal law provides with respect to state malpractice litigation. Procedural aspects such as choice of law and interpretation of federal common law formed the basis for the Court's decision. Constitutional questions, social policy, and a balancing of interests were not determinative factors in the result.[27] In summary, the Supreme Court in Ferri simply found that nothing in the purpose, the language, or the history of the Criminal Justice Act dictated that any state must accept the defense of immunity in a state malpractice action. The public policy considerations supporting absolute immunity which were relied upon

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[27] Bruggeman, Criminal Justice Act of 1964 - State Malpractice Suit Against Appointed Counsel, Ferri v. Ackerman, 13 Akron Law Rev. 745, at 751 (1980).

in Imbler v. Pachtman[28], and which have been discussed at length by other federal courts[29], were simply not controlling since Ferri involved neither a state public defender nor a federal claim.

In an issue that is heavily laden with policy questions and social considerations, the Supreme Court in Ferri chose to adopt a restrained position. However, while by-passing strong arguments of public policy, the Court was not oblivious to their existence or their merit. Indeed, the Court seemed to question the wisdom of allowing an indigent to sue his publicly provided and financed attorney, and clearly left the door open for change through legislative

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28 Imbler v. Pachtman, 424 U.S. 409 (1975).

29 Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978).

action.[30]

In the matter at hand, Polk County asserts that the rationale adopted by the Court in Ferri is not controlling when applied to this §1983 claim against a county public defender. It is more important to consider the duties and responsibilities of the public defender, and how he might be impeded in their performance if absolute immunity is not extended to him. Barr v. Matteo, 360 U.S. 564, at 575 (1959). The public's interest in providing - indeed, its duty to provide - free legal assistance to indigents accused of committing crimes will be better served by extending absolute immunity to public defenders than by withholding it. The case of any person, no matter how unpopular or offensive he,

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30 Ferri v. Ackerman, 444 U.S. 193, at 205 (1979).

his opinions, or his cause may be, if assigned to the public defender must - and we would not argue otherwise - be advocated as strenuously as possible. However, as a matter of public policy, it is imperative that the public defender not be placed in a position where he is compelled to gamble on the outcome of a case, with his own personal liability under §1983 hanging in the balance.

C. THE ROLE OF THE PUBLIC DEFENDER IN THE CRIMINAL JUSTICE SYSTEM IS NOT ADEQUATELY PROTECTED BY A GRANT OF A QUALIFIED IMMUNITY FOR ACTIONS BROUGHT UNDER 42 U.S.C. §1983; A RULE OF ABSOLUTE IMMUNITY IS NECESSARY TO PROTECT PUBLIC DEFENDERS FROM DISSATISFIED INDIGENT CLIENTS.

In his Brief, Respondent Dodson contends that "a qualified immunity is sufficient protection for discretionary acts" by public defenders (Respondent's Brief, p. 28), and that the public interest is best served by granting public

defenders only a qualified immunity under 42 U.S.C. §1983. The Respondent takes the questionable position that an award of a qualified immunity is "a fair and reasonable compromise between the interests of society and the public defender and his client." (Respondent's Brief, p. 34). This view is nothing more than a cursory approval of the concept of a qualified immunity, and fails to recognize the doctrine of absolute immunity as a rule designed to protect the public.

To the public defender confronted with the risk of being sued under §1983, the difference between an absolute and a qualified immunity is crucial. Indeed, the fate of an official with only a qualified immunity depends upon the circumstances and motivations of particular actions, as established by evidence at

a trial.[31] The Supreme Court has recently noted that where an official has been granted a qualified immunity from liability, the immunity issue cannot be resolved by a simple motion to dismiss and a trial on the merits ultimately may be required.[32] And subsequent cases have left little doubt that a full-blown trial will usually be needed to determine whether and to what extent a qualified immunity will actually be available to a defendant.[33] As a result, an official who knows that he enjoys a qualified immunity really knows very little about what that immunity protects. It is not merely the inevitable uncertainty owing

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31 Imbler v. Pachtman, 424 U.S. 409, 419 note 13 (1976).

32 Scheur v. Rhodes, 416 U.S. 232, 250 (1974).

33 Ohland v. City of Montpelier, 467 F.Supp. 324 (D. Vermont 1979); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975).

to the necessity of applying a general standard to particular facts, unsettling and unpredictable as that might be; the standard itself cannot be known until after trial, for it will depend, as the Court has told us, upon the officials level of discretion and responsibility and "all the circumstances." Scheur v. Rhodes, 416 U.S. 232, at 247 (1974).

Procedural aspects of a qualified immunity defense would also plague the public defender if Mr. Dodson's position is accepted. Many §1983 suits and Bivens[34] - type cases are tried to a jury[35], and the "good faith" issue is often submitted to it, thus enhancing the uncertainty inherent in the standard.

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[34] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[35] O'Conner v. Donaldson, 422 U.S. 563, at 577 (1975); See also, Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).

Although the Court has recently reserved the question[36], it appears that the burden of persuasion with regard to the availability of qualified immunity in §1983 cases rests upon the official.[37] And while the location of proof will not always decide the outcome of the immunity issue, it often is a determinative factor in the result of litigation.[38] In addition, discovery will often be required in order to resolve the issue of "good faith" in both its subjective and objective aspects.[39]

Perhaps most important, there is an inescapable and intimate relationship

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36 Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980).

37 Tyrrell v. Speaker, 535 F.2d 823, 828 (3rd Cir. 1976); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975).

38 Eckerd v. Indian River School District, 475 F.Supp. 1350, 1368 (D. Del. 1979).

39 Fujiwara v. Clark, 477 F.Supp. 822, 837 (D. Hawaii 1979).

between the point of litigation at which the immunity issue is resolved and the consequences of the qualified immunity standard itself. Qualified immunity undercuts vigorous decision-making to the extent that its availability cannot be readily established. This remains true even if the immunity is ultimately conferred and the public defender prevails. For if a trial is necessary to establish that the public defender acted properly and should not have to stand trial, then the purpose of the immunity - to promote vigorous decision-making and the exercise of independent judgment - will have been frustrated, the Respondent's assurances to the contrary notwithstanding.[40] Most certainly, this

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[40] Mr. Justice Rehnquist, concurring in part and dissenting in part in Butz v. Economou, 438 U.S. 478, at 527 (1978), alerted the Court to this particular result of qualified immunity by warning that to expect federal courts to "weed out insubstantial [§1983]claims" shows "more optimism than prescience." Id, at 527.

Court's prediction in Wood v. Strickland, 420 U.S. 308, at 320-321, 326 (1975), that the qualified immunity standard would not cause good faith decisions to be second-guessed by federal judges and juries has proved to be less than prescient.[41]

Finally, most cases applying a qualified immunity standard for public defenders will involve important conflicting values. They often will be resolved less on the basis of a proper weighing of analytically relevant factors than on the basis of inchoate, "gut" feelings about the case - for example, the moral character of the respective parties, the plight of the plaintiff if compensation is denied, the likelihood that a judgment against a

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[41] Kurland & Casper, The Supreme Court Review 1980 (1st Edition 1980).

defendant will ultimately be borne by a "deep pocket", and the like. One can only speculate whether such a decisional process will systematically favor plaintiffs or public defenders. The important point, however, is that the qualified "good faith" immunity standard, far from assuring a public defender that vigorous decision-making will be rewarded, is pregnant with risk to him/her: a rather small risk that he or she will ultimately be held liable, a somewhat greater risk that the immunity will be denied, and a substantial risk that a full-dress trial will be necessary to determine the applicability and scope of the immunity. It is within the ominous shadow cast by those risks that the public defender will decide what his duty - to himself as well as to the public - requires of him. Polk County

respectfully contends that the public interest does not demand such a result, but will be best served by absolutely protecting the public defender from such circumstances.

## CONCLUSION

For these reasons, the decision of the Eighth Circuit Court of Appeals should be reversed; public defenders should be found not to act under color of state law for the purposes of 42 U.S.C. §1983, and should be granted absolute immunity from actions brought under that act.

Respectfully submitted,

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CERTIFICATE OF FILING

I, Thomas M. Werner, hereby certify that I filed my Reply Brief for the Petitioners by depositing forty copies thereof in the United States mail on October 5, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543.

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CERTIFICATE OF SERVICE

I, Thomas M. Werner, hereby certify that on the 5th day of October, 1981, three copies of the Reply Brief for the Petitioners were mailed, postage prepaid, to John D. Hudson, 510 Fleming Building, Des

Moines, Iowa, Counsel for the Respondent. I also mailed three copies of the Reply Brief to Lawrence G. Wallace, Acting Solicitor General, Counsel for Amici United States, and Richard J. Wilson, Counsel for Amici NLADA and National Association of Criminal Defense Lawyers. I further certify that all parties required to be served have been served.

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No. 80-824

IN THE

# Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

*Petitioners,*

vs.

RUSSELL RICHARD DODSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# BRIEF OF AMICUS CURIAE

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## QUESTION PRESENTED

1. In the event that the Court finds that public defenders act under color of state law for purposes of 42 U.S.C. §1983 and that they are not absolutely immune from liability, is a grant of qualified immunity with a good faith standard necessary as a matter of public policy?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | ii |
| Interest of Amicus Curiae | 1 |
| Statute Involved | 2 |
| Argument | 2 |
| Conclusion | 6 |


## TABLE OF AUTHORITIES

**Cases:**


Ferri v. Ackerman, 444 U.S. 193 (1979) .....3, 4, 5
Imbler v. Pachtman, 424 U.S. 409 (1976) .....2, 5
Minns v. Paul, 542 F.2d 899 (4th Cir. 1976) ..... 3
O'Connor v. Donaldson, 422 U.S. 563 (1975) ..... 2
Pierson v. Ray, 386 U.S. 547 (1964) ..... 2
Polk County v. Dodson, 628 F.2d 1104 (8th Cir. 1980) .....3, 4, 6
Procunier v. Navarette, 434 U.S. 555 (1978) ..... 2
Scheuer v. Rhodes, 416 U.S. 232 (1974) ..... 2
State v. Knaffla, 309 Minn. 246, 243 N.W.2d 737 (1976) ..... 6
State v. Ray, 273 N.W.2d 652 (Minn. 1978) ..... 6
Wood v. Strickland, 420 U.S. 308 (1975) ..... 2


**Statutes:**


42 U.S.C. §1983 .....passim
18 U.S.C. §3006A(d) ..... 5

IN THE

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*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF OF AMICUS CURIAE

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### INTEREST OF AMICUS CURIAE

The interest of the Minnesota State Public Defender arises from the fact that it is subject to similar suits and its liability under 42 U.S.C. §1983 will be determined by the Court's holding in this case.

### STATUTE INVOLVED

42 U.S.C .§1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state

> or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## ARGUMENT

### IF THE COURT FINDS THAT PUBLIC DEFENDERS ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF 42 U.S.C. §1983 AND THAT THEY ARE NOT ABSOLUTELY IMMUNE FROM LIABILITY, A GRANT OF QUALIFIED IMMUNITY WITH A GOOD FAITH STANDARD IS NECESSARY AS A MATTER OF PUBLIC POLICY.

42 U.S.C. §1983 does not provide immunity to any individual found to be acting under color of state law. Section 1983 imposes liability upon "[e]very person." However, the United States Supreme Court has, on a number of occasions, held certain public servants either absolutely or qualifiedly immune from suit under this section. The Court has found judges and prosecutors among other officials to be absolutely immune. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967). It has found qualified immunity for various public officials. *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendent); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board member); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officers); *Pierson v. Ray*, 386 U S. 547 (1964) (police officers).

The Supreme Court, in addressing the issue of immunity under §1983, has traditionally inquired into the common-law immunity accorded the public servant involved and then reviewed the policy interests warranting the immunity. If the Court found that public policy considerations justified a grant of immunity, it determined whether full or qualified immunity was appropriate. Because the public defender has so recently arrived upon the scene, there is no common-law history to examine. Consequently, the immunity question must be determined solely by an inquiry into public policy.

The two most compelling policy reasons for extending qualified immunity are (1) the public interest in recruiting and retaining competent and vigorous attorneys to represent indigents, a concern expressed by this Court in *Ferri v. Ackerman*, 444 U.S. 193 (1979); and (2) the public interest in encouraging public defenders to exercise their best judgment with discretion to make such decisions as to decline to press the frivolous, to assign priorities between clients and to make decisions in the best interests of each client. *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976) cert. denied 429 U.S. 1102 (1977).

Other related concerns include (1) the public interest in avoiding diversion of public defender time and energy into defending malpractice suits, especially in light of the time problem already existing in most defender offices, and, as the Eighth Circuit observed, (2) the incongruity of granting "such immunity to other public servants . . . who regularly exercise their discretion in ways that touch upon constitutional rights, and [yet denying] this protection to public defenders." *Polk County v. Dodson*, 628 F.2d 1104, 1108 (8th Cir. 1980).

In evaluating these public policy interests, the special circumstances under which public defenders often operate must also be considered. These special circumstances include (1) heavy caseloads, (2) inability to choose which potential clients to represent, (3) monetary compensation less than that of the private bar, (4) less adequate resources in terms of libraries, investigators, witness costs, and staff, and (5) greater exposure to suit for malpractice due to potential liability under 42 U.S.C. §1983.

In *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), the United States Supreme Court acknowledged that valid public policy reasons might justify an immunity for appointed counsel. *Ferri* dealt with the narrow issue of whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of law, entitled to absolute immunity in a legal malpractice action in the state courts. The Court held in the negative. The Court however, also stated that "[p]erhaps the most persuasive reason for creating an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants" and noted that "[i]f their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disporportionately significant, it is conceivable that an immunity would be justified. . . ." 444 U.S. at 204-205. Certainly these two concerns apply equally to court-appointed counsel and all other public defenders.

In *Polk County v. Dodson*, 628 F.2d 1104, 1111 (8th Cir. 1980), Judge William A. Overton pointed out in his dissenting opinion that public defenders are "notoriously

overworked and underpaid."[1] In addition, there are statistics which lend substantial support to the contention that public defenders will, in all likelihood, be forced to defend a disproportionate number of suits charging inadequate representation if they are open to suit under §1983 and granted no immunity. Filings by state prisoners in civil rights cases have increased dramatically since 1970.[2] In *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), this Court stated that §1983 suits against prosecutors without full immunity "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." Since prosecutors are fully immune, the unhappy defendant may well turn his attention to his state-paid attorney who comes to him clothed in the authority of the state and whose services he has little choice but to accept. Under these circumstances qualified immunity is certainly required and is in no way prohibited by the Court's holding in *Ferri*.

Additionally, if the state, itself, provides a procedure within the context of the criminal system to obtain relief for a reversible error made by an attorney, then there is no need to impose any liability upon the attorney as there would be no damages. For example, in Minnesota every convicted defendant has the right to at least one state corrective process designed to afford review of claimed

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[1]The compensation for court appointed public defenders in the federal courts has not changed since 1970. 18 U.S.C. §3006A(d).

[2]The increase in filings since 1970 has been 451.5%. The Reports of the Judicial Conference - Report of the Administrative Office, U.S. Courts, 1979, at 221-222. In Minnesota, prisoners are monitoring this type of litigation closely. See, Waletski, Everyone But Public Defender is Immune, Pillar, Vol. 80, No. 6 (Inmate Newspaper of the Minnesota Correctional Facility at St. Cloud, Minnesota) at 7.

violations of the Federal or State Constitutions or of state law. *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976); Cf. *State v. Ray*, 273 N.W.2d 652 (Minn. 1978). Thus, even if a defendant fails to file a timely appeal, he still has the right to a post-conviction review of his claim. Under these circumstances, any reversible wrong may be quickly corrected within the system and there will be infrequent instances in which any need will exist for a remedy in the federal courts under 42 U.S.C. §1983.

## CONCLUSION

In conclusion, amicus curiae, Minnesota State Public Defender, respectfully requests that if the Court finds that public defenders act under color of state law and that they are not absolutely immune under 42 U.S.C. §1983, that the Court grant public defenders a qualified immunity based upon a good faith standard as defined in the decision of the Eighth Circuit Court of Appeals. *Polk County v. Dodson*, 628 F.2d 1104, 1107-8 (8th Cir. 1980).

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**On Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit**

## BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE

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## TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF AMICI | 1 |
| ARGUMENT | 3 |
| A FUNCTIONAL TEST SHOULD BE APPLIED TO DETERMINE WHETHER OR NOT THE ACTS OF A PUBLIC DEFENDER ARE PERFORMED UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. SEC. 1983. | |
| A. A public defender does not act under color of state law when the alleged wrong is committed in the course of individual client representation. | 7 |
| B. A public defender does act under color of state law when the alleged wrong is committed pursuant to policies or practices of the office administration, a supervisory authority or a funding source. | 12 |
| CONCLUSION | 14 |


## TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| *Anders* v. *California*, 368 U.S. 738 (1967) | 4 |
| *Butz* v. *Economou*, 438 U.S. 478 (1978) | 4 |
| *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980) | 4, 8, 11 |
| *Dodson* v. *Polk County*, No. 79-1996, 8th Cir. (8/26/80) | 8 |
| *Ferri* v. *Ackerman*, 444 U.S. 193 (1979) | 3, 4, 8, 14 |
| *French* v. *Corrigan*, 432 F.2d 1211 (7th Cir. 1970) | 9 |
| *Graseck* v. *Marceri*, 582 F.2d 203 (2d Cir. 1978), cert. den. 439 U.S. 1129 | 7 |
| *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) | 4 |
| *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) | 8 |
| *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971) | 6 |
| *Minns* v. *Paul*, 542 F.2d 889 (4th Cir. 1976) | 13 |
| *Monroe* v. *Pape*, 365 U.S. 167 (1961) | 6, 12 |
| *Moore* v. *United States*, 423 F.2d 730 (3rd Cir 1970) | 7 |
| *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968) | 9 |
| *Pierson* v. *Ray*, 386 U.S. 547 (1967) | 4 |

**Table of Authorities Continued**


| | Page |
|---|---|
| *Slavin* v. *Curry*, 574 F.2d 1256 (5th Cir. 1978) | 9 |
| *State ex rel. Butler* v. *Demis*, 66 Ohio St.2d 123 (1981) | 9 |
| STATUTES: | |
| 42 U.S.C. Sec. 1983 | *passim* |
| Ohio R.C. 120.33 (A)(B) | 9 |
| OTHER AUTHORITIES: | |
| American Bar Association Standards for Criminal Justice, *Providing Defense Services*, Stan. 5-13; *The Defense Function*, Stan. 4-39(2d Ed. 1980) | 5 |
| Benner and Lynch Neary, *The Other Face of Justice*, National Legal Aid and Defender Association (1973) | 9 |
| Booknote, 50 Denver L.J. 47 (1973) | 10 |
| Casper, *Improving Defender-Client Relations*, 35 NLADA Briefcase 114 (1978) | 10 |
| Gozansky and Kertz, *Private Lawyer's Liability Under 42 U.S.C. Sec. 1983*, 24 Emory L.J. 959 (1975) | 6, 9 |
| Harris, *Annals of Law — In Criminal Court*, The New Yorker, April 14, 1973 at p. 45 | 12 |
| Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 305 (1969) | 10 |
| O'Brien, Peterson, Wright and Hostica, *The Criminal Lawyer: A Defendant's Perspective*, 5 Am. J. Crim. L. 275, 292, 308 (1977) | 10 |
| Silberman, *Criminal Violence, Criminal Justice*, Random House (1978) | 12 |
| Washington Post, *The Cost of Defending Indigents: A Nationwide Problem*, May 27, 1981, p. A2 | 12 |

IN THE

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## BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE

### INTEREST OF AMICI

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

(2) NLADA joins petitioner in seeking reversal of the judgment of the United States Court of Appeals for the Eighth Circuit, recognizing the possibility that its position will expose a public defender (here, either Petitioner Shepard or the Polk County Offender Advocate) to potential liability for violation of Respondent's civil

rights under 42 U.S.C. Sec. 1983. NLADA has a keen interest in advancing the professionalism of all public defenders, and the Association feels this Court will be aided by the position of the only national group which speaks for public defenders.*

(3) NLADA also has an interest in protecting the rights of indigent clients and in insuring that they are denied no rights on the basis of their wealth and submits this brief in support of indigent clients' equal access to the civil courts.

(4) The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 2,000 lawyers who are citizens of every State, and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors, and judges of the state and federal courts.

(5) Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

The purposes of the Association, as set out in its bylaws, are:

(a) To promote study and research in the field of criminal defense law and the related arts;

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*As part of its services to members, NLADA offers professional liability insurance to public defenders. The association receives no monetary benefit from the insurer as a result of the purchase of coverage by members of the Association.

(b) To disseminate by lecture, seminars and publications the advancement of the knowledge of the law as it relates directly and ancillary to the field of criminal defense practice;

(c) To promote the proper administration of criminal justice;

(d) To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases;

(e) To foster periodic meetings of defense lawyers and to provide a forum for the material exchange of information regarding the administration of criminal justice and thereby concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures.

(6) Amici argue only the question of whether public defenders act under color of state law, for purposes of 42 U.S.C. Sec. 1983. Amici take no position on the issue of immunity.

(7) The National Legal Aid and Defender Association has received the written consent of both parties for the filing of this brief. The National Association of Criminal Defense Lawyers has received the written consent of both parties for the filing of this brief.

## ARGUMENT

### A FUNCTIONAL TEST SHOULD BE APPLIED TO DETERMINE WHETHER OR NOT THE ACTS OF A PUBLIC DEFENDER ARE PERFORMED UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. SEC. 1983.

In *Ferri* v. *Ackerman,* 444 U.S. 193 (1979), this Court recognized that the responsibilities of an attorney appointed to represent an indigent defendant in federal court differ radically from those of the judge, the pros-

ecutor and the grand jury. Conversely, the court recognized the strong parallels between "the primary office" of appointed counsel and that of privately retained counsel in criminal cases. *Ferri* v. *Ackerman, supra,* 444 U.S. at 202-204. Again last term, this Court refused to make distinctions between privately retained counsel and appointed counsel, in the context of a Sixth Amendment denial of effective assistance due to an alleged conflict of interest. *Cuyler* v. *Sullivan,* 446 U.S. 335, 344-345 (1980). In the case at bar, this Court is again called on to recognize the fundamental similarities between appointed and retained counsel in representation of their clients in criminal cases.

In seeking relief under 42 U.S. Sec. 1983, the threshold question is two-pronged: (1) whether plaintiff has been deprived of a right protected by the Constitution, and (2) whether the deprivation occurred "under color of state law."[1] In deciding whether action has taken place under color of state law, this Court has implicitly looked to the position or role played by the person alleged to have committed the wrong. See, e.g., *Imbler* v. *Pachtman,* 424 U.S. 409, (1976) (prosecutors); *Butz* v. *Economou,* 438 U.S. 478, (1978) (federal officers); *Pierson* v. *Ray,* 386

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[1] The first element of this test is not in question in this case, but should be subjected to close scrutiny on remand, since the only allegation made by respondent is a claim of denial of various constitutional rights due to the filing of a motion to withdraw as counsel on grounds that the appeal was frivilous, pursuant to this Court's decision in *Anders* v. *California,* 368 U.S. 738 (1967). Without amendment of the pleadings, or the willingness by this Court to again examine the procedures approved in *Anders,* the allegation of malfeasance in the filing of a motion to withdraw is insufficient to state a cause of action, since such action is putatively taken in *fulfillment,* not derogation, of the right to adequate assistance of appellate counsel under the Sixth Amendment.

U.S. 547 (1967) (judges). This analysis is not appropriate for the public defender, and Amici urge this Court instead to adopt a functional test, under which the actions, or functions, of the public defender, rather than the role or position occupied, would determine whether the jurisdiction of the court can be invoked because the wrongdoing occurred "under color of state law." If the actions are taken pursuant to representation of an individual client, that lawyer should stand in no different position before the law than the court-appointed or privately retained attorney. No state action has occurred. However, if the actions of the attorney are taken pursuant to policies or practices of the office itself, or a governmental administrative or funding source, action under color of state law has occurred.

There are several reasons why this test must be used, both theoretically and practically. First and foremost, the public defender is unique in his or her relationship to government. A public defender "office" may be a governmentally funded unit, a private not-for-profit corporation, or a private law firm, among other hybrid formulations. In fact, the term "public defender" has no universal meaning, and its use to describe a person performing "under color of state law" is inherently ambiguous. Whatever the specific structure, however, a "public defender" is established by a state or local government to conform to the constitutional mandate for counsel in criminal cases. However, once appointed to represent an individual client, that public defender's client loyalty may, and sometimes must, be antagonistic to the public's interest. American Bar Association, *Standards for Criminal Justice, The Defense Function.* Stan. 4-3.9; *Providing Defense Services,* Stan. 5-1.3 (2d Ed. 1980). In order to perform work for the individual, the public defender must therefore be free from all governmental restraint or

interference. This is so whether or not there is a structure for administration and funding of that attorney's representation, and regardless of the source of that administration or funding. Thus, in deciding whether the public defender has performed "under color of state law," the purpose for which the activity is performed must be examined.

Second, the purpose of 42 U.S.C. Sec. 1983 is to protect against unjust interference by the *government* in the exercise of constitutional rights. It is therefore not entirely accurate to determine whether there is state action by focusing on the position occupied by the person alleged to have engaged in unconstitutional conduct. The issue is the source of authority pursuant to which action was taken, contrary to a person's constitutionally protected rights. Gozansky and Kertz, *Private Lawyer's Liability Under 42 U.S.C. Sec. 1983,* 24 Emory L.J. 959, 970-972 (1975). *Monroe* v. *Pape,* 365 U.S. 167, 184 (1961). If the government is sufficiently involved in a violation of rights, the state action requirement of 1983 is satisfied. For the public defender, this means that there must be a clear distinction as to whether the source of the alleged wrong lies in the defender's acts as a governmental agent, or in actions as counsel, representing an individual client in the best exercise of professional judgment.

Third, the functional analysis is not unknown to the law, and has in fact been applied in highly analogous situations. The most relevant of these is the determination whether a private not-for-profit organization providing legal aid with public funds acts under color of state law within 42 U.S.C. 1983. There is a direct analogy between an entity providing indigent representation and an individual performing those same services. In *Lefcourt* v.

*Legal Aid Society,* 445 F.2d 1150, 1156-1157 (2d Cir. 1971) the court examined the question of whether the Society had wrongfully discharged an attorney employed there. The court's analysis did not proceed from the premise that it had to decide whether the Society always or never acted under color of state law, but whether the questioned employment practices of the Society were part of its public or private functions, recognizing that it performed both. The court concluded that these practices were essentially private, but implicitly could have found sufficient governmental involvement in the employment activities actions of the Society to justify a conclusion that state action had occurred. See also, *Graseck* v. *Marceri,* 582 F.2d 203 (2d Cir. 1978), cert. den. 439 U.S. 1129. A similar analysis can as easily be applied to the actions at issue in the case at bar.

The functional test for public defender liability is not merely useful; it is required for meaningful analysis.

**A.**

**A Public Defender Does Not Act Under Color Of State Law When The Alleged Wrong Is Committed In The Course Of Individual Client Representation.**

In the course of individual client representation, the public defender is no more acting under color of state law than is the privately retained or court-appointed lawyer, when that lawyer serves as an "officer of the court." In individual representation, public defenders are not only free of state control; they are obligated by rules of court and ethical considerations to treat their clients as though they were counsel receiving fees. *Moore* v. *United States,* 423 F.2d 730 (3d Cir. 1970).

In all respects, then, public defenders perform an essentially private function when representing their in-

dividual clients. That private function was recognized by this Court in *Ferri* v. *Ackerman,* where it was stated:

> Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.
>
> *Ferri* v. *Ackerman, supra,* 444 U.S. at 204.

If the public defender acts privately in individual representation, but is publicly employed, there can be state action only if "there is a sufficiently close nexus between the State and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974).

It is frequently asserted, as it was below in the Eighth Circuit, that the public defender is "empowered" by the state because the state selects, hires and fires, and may well limit the scope of services to be provided. Moreover, it is argued, the state is involved even in the selection of counsel, since counsel is chosen for the defendant. *Dodson* v. *Polk County,* No. 79-1996, 8th Cir., Aug. 26, 1980, Op. at 6-7. These assertions wrongly focus on the relationship between the government and counsel. Rather, the focus should be on the control exerted by the *client* — whether the client's relationship is primarily with the state or with counsel. This Court should continue the reasoning developed in *Ferri* v. *Ackerman* and *Cuyler* v. *Sullivan, supra,* and recognize the relationship as one of attorney-and-client, rather than government-and-client.

That public defenders *may* be hired and paid by the government is true;[2] to suggest that this means their first loyalty is to the government is totally inaccurate. This suggests that money alone supplies a sufficient nexus between the government and counsel to allow a finding of state action. In fact, clients pay fees to their retained counsel, and those fees are clearly related to the sanction which society gives to that relationship by requiring the extensive educational and licensing requirements of attorneys. Yet, for all the privileges bestowed by society, through court rules and legislation, upon retained counsel, no court has held that a private lawyer is engaged in state action under 42 U.S.C. Sec. 1983. Gozansky and Kertz, *Private Lawyer's Liability Under 42 U.S.C. Sec. 1983, supra.* In fact, court decisions have uniformly held that counsel engaged in private practice and appointed to criminal cases are not within the ambit of state action. *Slavin* v. *Curry,* 574 F.2d 1256, 1265 (5th Cir. 1978); *French* v. *Corrigan,* 432 F.2d 1211, 1214 (7th Cir. 1970); *Mulligan* v. *Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968). Unless these decisions are wrong, any holding that public defenders, when engaged in individual client representation act under color of state law would leave

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[2] "Public Defenders" may include full-and part-time counsel paid from city, county, court and state funds, or some combination thereof; counsel performing in a government office, a law-school clinic, a not-for-profit corporation, or limited partnership; private counsel who perform pursuant to an open-bid or closed-bid contract; or private counsel who perform the work *pro bono* or through privately obtained funds. Cf. Benner and Lynch Neary, *The Other Face of Justice* (NLADA, 1973). Not even appointment to perform the work can be considered a common element, since some jurisdictions allow the defendant's involvement in the selection of counsel. See, e.g., Ohio R.C. 120.33 (A) and (B); but see *State ex rel. Butler* v. *Demis,* 66 Ohio St.2d 123 (1981).

public defenders on a qualitatively different standard than their private court-appointed and privately-retained counterparts. Such a distinction would set publicly funded counsel apart unnecessarily and would reinforce what is already a difficult hurdle for most public defenders; that of convincing their clients that the first loyalty of the lawyer is to the client, not the government. Without the trust of the client that comes with this knowledge, the attorney-client relationship is reduced to a mere formality.

No attorney, civil or criminal, who makes his or her livelihood representing clients would minimize the value of securing the client's trust to successful performance. Without this critical bond it is impossible to lead even the most sophisticated client on the course which is most in his or her interest. The difficulties of establishing such trust are of course magnified when the client is unsophisticated and his or her freedom and reputation are at stake. Where the attorney is a public defender or, to a lesser extent, when the lawyer is court-appointed private counsel, the problem of gaining the client's trust is magnified due to the institutional position of government-funded counsel. As every public defender knows from experience and as every study of client relations has demonstrated, indigent defendants have a fundamental mistrust of such attorneys because they perceive them as having a primary allegiance to the state or prosecution. See Casper, *Improving Defender-Client Relations,* 35 NLADA Briefcase 114, 126 (1977); O'Brien, Peterson, Wright & Hostica, *The Criminal Lawyer: The Defendant's Perspective,* 5 Am. J. Crim. L. 275, 292, 308 (1977); Booknote, 50 Denver L.J. 47, 83 (1973); Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess, 305 (1969). The result of this perception and mistrust all too

often is misguided self-help on the part of indigent clients and such disregarding of counsel's sound advice as to essentially lessen counsel's ability to provide effective representation. This crisis of confidence had adverse effects on the court system as well as on the client, since distrust of the "state defense lawyer" is also manifested in defendants' meritless appeals and collateral petitions.

The only way to eliminate this critical obstacle to providing skillful, constitutional representation to the indigent defendant is to keep public defenders as close as possible to the institutional position of private counsel, in whom indigent defendants have the greatest faith.

Again, the fact that the client has little or no choice in selection of counsel should not bear on the issue of state action. The same is true for appointed counsel in private practice. Yet, as noted above, courts find no state action in this process. In fact, in *Cuyler* v. *Sullivan* this Court recognized the lack of client control even in the selection of *retained* counsel. *Cuyler* v. *Sullivan, supra,* 446 U.S. at 344-345. Moreover, this fact strongly implies that the public defender is a second-class citizen of the profession, and clearly would not be chosen if the opportunity arose. While this may be true in some cases, the opposite is also true. The remedy is not to reinforce the distinctions, but to insure that public defenders have the resources necessary to conduct their defense.

In short, neither the source of remuneration nor the origin of the relationship should govern counsel's unfettered discretion in the exercise of professional skill and responsibility on behalf of the individual client.

**B.**

**A Public Defender Does Act Under Color Of State Law When The Alleged Wrong Is Committed Pursuant To Policies Or Practices Of The Office Administration, A Supervisory Authority Or A Funding Source.**

While the public defender does occupy a singularly private relationship with the individual client, the "office" of the public defender, because it receives governmental funds and exercises certain governmental powers, can affect that private relationship to such an extent as to rise to state action. In *Monroe* v. *Pape,* 365 U.S. 167, 184 (1961), this Court stated that "(m)isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state, is action taken 'under color of' state law."

It is frequently noted that public defender offices are perpetually underfunded, understaffed and overworked, and that the defendant is justifiably skeptical of adequate representation under such circumstances. See Harris, *Annals of Law — In Criminal Court,* New Yorker, April 14, 1973, at 45-88, April 21, 1973, at 44-87; Silberman, *Criminal Violence, Criminal Justice,* pp. 304-305 (Random House 1978); *Washington Post,* "The Cost of Defending Indigents: A Nationwide Problem", May 27, 1981, p. A2.

Such criticism is, fortunately, often not true, but the client whose case is affected by these systemic shortcomings should have a remedy under 42 U.S.C. Sec. 1983. These are the very abuses by government to which the Civil Rights Acts are addressed. Moreover, allowing access to 1983 action under such circumstances draws a bright line between alleged indescretions by counsel which are part of individual representation, and those which emanate from the burden which the state places upon counsel to perform in an unconstitutional fashion.

It is no response to argue that public defenders will always work under such conditions, that they must inevitably make some decisions for the good of all clients, and that therefore they always act under color of state law. First, public defenders do not, *per se,* suffer from institutional shortcomings. Second, all attorneys must make choices as to how to allocate time and resources. This alone does not justify including or removing them from state action. However, when those choices are affected by office policies, statutory limitations or funding levels, the attorney's choice has clearly been made while cloaked in the mantle of state authority, and the client should have a remedy.

Restricting the remedies for those injured by overworked and inadequately supported defender staffs is hardly an acceptable response to the problem. In the context of the 1983 claim, it is a matter of proof to determine whether the actions of the defender were part of the strategy in providing effective representation, or were taken pursuant to policies or practices of the office, the supervisor or a governmental authority. The only acceptable response to the problem of overwork and inadequate support is for legislatures, and courts where necessary, to insure that public defenders be given the resources necessary to provide effective assistance of counsel to the poor, or to pay the price for failure to provide such resources.

A more insidious argument against state action has been that leaving public defenders open for suit will discourage competent attorneys from entering or remaining in this field. Cf. *Minns* v. *Paul,* 542 F.2d 889, 901 (4th Cir. 1976) cert. denied, 429 U.S. 1102. This argument unfairly impugns the dedication and abilities of those lawyers who, in obedience to the commands of the Con-

stitution and the standards of our profession, make their careers defending the poor in criminal cases. Moreover, it introduces the vice of implicitly accepting unconstitutional inadequacies in our system for providing representation of the poor. At the same time, it clearly reveals the danger that such protection will encourage incompetence rather than more effective representation. To the extent there is a problem with attracting or retaining skilled attorneys to represent the poor, the rational solution is to provide higher salaries and better working conditions. After all, it could not seriously be contended that the absence of state action discourages able attorneys from representing the rich. See also, *Ferri* v. *Ackerman, supra,* 444 U.S. at 200, fn. 17.

On the other hand, a holding that public defenders never act under color of state law is a virtual imprimatur for the office or the government to continue to abuse its authority in the administration or funding of public defender offices.

## CONCLUSION

Respondent was unrepresented in the District Court. The pleadings in this case are inarticulate, at best, and demonstrate a strong showing for the need for an order appointing counsel. Without more, Amici argue that serious questions remain as to the liability of any or all of the Petitioners for actions taken pursuant to policies or practices which might have denied Mr. Dodson his constitutional rights.

Amici urge this Court to grant Mr. Dodson the relief he sought in the Eighth Circuit: remand to the District Court. There proceedings could be held consistent with a

conclusion that a functional test to determine state action by the public defender must be applied to the amended allegations of the pleadings.

Respectfully submitted,

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CLERK

No. 80-824

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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POLK COUNTY, ET AL., PETITIONERS

*v.*

RUSSELL RICHARD DODSON

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

The United States will address the following question:

Whether a county-employed public defender acts under color of state law, within the meaning of 42 U.S.C. 1983, in representing indigent criminal defendants.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement: | |
| A. Procedural History | 3 |
| B. Statutory scheme | 5 |
| Summary of argument | 7 |
| Argument: | |
| A county-employed public defender acts under color of state law, within the meaning of 42 U.S.C. 1983, in representing indigent criminal defendants | 9 |
| Conclusion | 23 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 | 2, 9, 11 |
| *Barnes* v. *Dorsey*, 480 F.2d 1057 | 12 |
| *Braden* v. *University of Pittsburgh*, 552 F.2d 948 | 21 |
| *Branti* v. *Finkel*, 445 U.S. 507 | 14 |
| *Brown* v. *Joseph*, 463 F.2d 1046, cert. denied, 412 U.S. 950 | 17 |
| *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 | 8, 9, 18, 19, 20 |
| *Chalfant* v. *Wilmington Institute*, 574 F.2d 739 | 21 |
| *Civil Rights Cases*, 109 U.S. 3 | 12 |
| *Conley* v. *Gibson*, 355 U.S. 41 | 22 |
| *Cuyler* v. *Sullivan*, 446 U.S. 335 | 20 |
| *Douglas* v. *California*, 372 U.S. 353 | 15 |
| *Espinoza* v. *Rogers*, 470 F.2d 1174 | 17 |
| *Estelle* v. *Gamble*, 429 U.S. 97 | 15 |
| *Ferri* v. *Ackerman*, 444 U.S. 193 | 8, 13 |

Cases—Continued Page

*French* v. *Corrigan*, 432 F.2d 1211, cert. denied, 401 U.S. 915 ..... 12
*Gideon* v. *Wainwright*, 372 U.S. 335 ..... 15
*Hall* v. *Quillen*, 631 F.2d 1154 ..... 12
*Hollenbaugh* v. *Carnegie Free Library*, 545 F.2d 382 ..... 12
*Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345.. 19, 21
*Johnson* v. *Hackett*, 284 F. Supp. 933 ..... 11
*Miller* v. *Barilla*, 549 F.2d 648 ..... 17
*Monroe* v. *Pape*, 365 U.S. 167 .....2, 9, 10, 21, 23
*Mulligan* v. *Schlachter*, 389 F.2d 231 ..... 12
*Page* v. *Sharpe*, 487 F.2d 567 ..... 12
*Peake* v. *County of Philadelphia*, 280 F. Supp. 853.. 18
*Robinson* v. *Bergstrom*, 579 F.2d 401 .....16, 17, 21
*Robinson* v. *Jordan*, 494 F.2d 793 ..... 14, 17
*Rogers* v. *Okin*, 634 F.2d 650, cert. granted on questions unrelated, No. 80-1417 (Apr. 20, 1981) ..... 15
*Screws* v. *United States*, 325 U.S. 91 .....9, 10, 23
*Shelley* v. *Kraemer*, 334 U.S. 1 ..... 12
*Skipper* v. *Brummer*, 598 F.2d 427, vacated and remanded on other grounds, 444 U.S. 1063 ..... 16-17
*Slavin* v. *Curry*, 574 F.2d 1256, modified on other grounds, 583 F.2d 779 ..... 16
*Stengel* v. *Belcher*, 522 F.2d 438, cert. dismissed as improvidently granted, 429 U.S. 118 ..... 11
*Sullens* v. *Carroll*, 446 F.2d 1392 ..... 17
*Thomas* v. *Howard*, 455 F.2d 228 ..... 18
*United States* v. *Classic*, 313 U.S. 299.....7, 8, 9, 10, 18, 21
*United States* v. *Price*, 383 U.S. 787 ..... 2, 9
*United States* v. *Senak*, 477 F.2d 304, cert. denied, 414 U.S. 856 ..... 16, 23
*United States* v. *Senak*, 527 F.2d 129, cert. denied, 435 U.S. 907 ..... 16
*United States ex rel. Simmons* v. *Zibilich*, 542 F.2d 259 ..... 17
*United States ex rel. Wood* v. *Blacker*, 335 F. Supp. 43 ..... 17
*Williams* v. *United States*, 341 U.S. 97 ..... 9

Constitution, statutes and rule: Page

United States Constitution:

Sixth Amendment ..... 22
Eighth Amendment ..... 22
Fourteenth Amendment ..... 3-4, 9, 22
18 U.S.C. (1940 ed.) 52 ..... 10
18 U.S.C. 242 ..... 2, 9, 10
28 U.S.C. 2254 ..... 4
42 U.S.C. (& Supp. III) 1983 ..... *passim*
Iowa Code Ann. (West 1977 & Cum. Supp. 1980):
Chapter 336A ..... 5
§ 336A.1 ..... 5
§ 336A.2 ..... 6
§ 336A.3 ..... 6
§ 336A.4 ..... 6
§ 336A.5(1) ..... 6
§ 336.5(2) ..... 6
§ 336A.5(3) ..... 6
§ 336A.6 ..... 11
§ 336A.7 ..... 14
§ 336A.8 ..... 7
§ 336A.9 ..... 6
§ 336A.10 ..... 6
§ 336A.11 ..... 7
Iowa R. App. P. 104 ..... 3

Miscellaneous:

*Liability of Public Defenders under Section 1983: Robinson* v. *Bergstrom*, 92 Harv. L. Rev. 943 (1979) ..... 14, 21-22
Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656 (1974) ..... 20

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### INTEREST OF THE UNITED STATES

The statute involved in this case, 42 U.S.C. 1983,[1] establishes civil liability for any deprivation of fed-

[1] 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Recent amendments to the provision (see 42 U.S.C. (Supp. III) 1983) do not affect the issue in this case.

eral constitutional or statutory rights under color of state law. The same conduct is subject to criminal prosecution by the United States under 18 U.S.C. 242.[2] The phrase "under color of * * * law" is accorded the same meaning under Section 242 as under Section 1983. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 n.7 (1970); *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961). Resolution of the color of law question presented in this case will therefore have a direct effect on the ability of the United States to prosecute similar conduct under 18 U.S.C. 242. See, *e.g.*, *United States* v. *Senak*, 477 F.2d 304 (7th Cir.), cert. denied, 414 U.S. 856 (1973) (prosecution of public defender for exacting payment from clients', friends or relatives for performance of his duties).[3]

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[2] 18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

[3] We leave to the parties the question of immunity under Section 1983 for public defenders. Resolution of that question will not directly affect criminal prosecutions under Section 242.

## STATEMENT

### A. Procedural history

Respondent filed a pro se complaint under 42 U.S.C. 1983 in the United States District Court for the Southern District of Iowa, alleging that petitioner Martha Shepard, an attorney in the Polk County Offender Advocate's Office, had failed to represent him adequately in his appeal of a robbery conviction to the Iowa Supreme Court (A. 4-23).[4] Ms. Shepard, who had been appointed to represent respondent on his appeal, had moved to withdraw as counsel and to have the appeal dismissed as frivolous, pursuant to Rule 104 of the Iowa Rules of Appellate Procedure.[5] The motion had been granted and the appeal had been dismissed (Pet. App. A3). Respondent alleged in his Section 1983 complaint that petitioner Shepard's conduct had deprived him of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process

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[4] "A." refers to the joint appendix. "Pet. App." refers to the appendix to the petition.

[5] Rule 104 provides in pertinent part:

> (a) If counsel appointed to represent a convicted indigent defendant in an appeal to the Supreme Court is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the Supreme Court in writing to withdraw. * *
>
> * * * * *
>
> (d) * * * If [the Supreme Court] finds [that the appeal is wholly frivolous], it may grant counsel's motion to withdraw and dismiss the appeal.
>
> * * * * *

Clause of the Fourteenth Amendment. The complaint also included pendent state claims for malpractice and for breach of an oral contract to prosecute the appeal (*id.* at A3-A4).

The complaint also named the Polk County Offender Advocate, the Polk County Board of Supervisors, and the County itself as defendants (Pet. App. A4). Respondent alleged that these petitioners were responsible for Ms. Shepard's actions because they had established rules and procedures for her to follow in handling criminal appeals (*ibid.*). The complaint sought both monetary damages and injunctive relief, including release from confinement (A. 21-22).

The district court (Pet. App. B) dismissed the suit as frivolous. The claim for release from confinement was treated as a request for habeas corpus relief under 28 U.S.C. 2254, and was dismissed for failure to exhaust state remedies as required by that statute (Pet. App. B3). The remaining federal claims were dismissed for failure to state a claim cognizable under 42 U.S.C. 1983. The court ruled that petitioner Shepard and the Polk County Offender Advocate had not acted "under color of state law," and that the complaint did not allege the requisite personal involvement on the part of Polk County and its Board of Supervisors (Pet. App. B3-B12). The pendent state claims were also dismissed (*id.* at B12).

On appeal, the court of appeals, in a divided opinion (Pet. App. A), reversed the judgment of the district court and remanded the case for further proceedings as to all claims except respondent's claim for release from confinement (the dismissal of which was affirmed). The court of appeals held that a county-employed public defender *does* act under color of state law in representing indigent defendants (*id.*

at A6-A7), and that he or she enjoys only a qualified immunity from liability for actions taken while representing such clients (*id.* at A14-A15). The court further held (*id.* at A16-A17) the allegations of the complaint sufficient, as a matter of pleading, to state a Section 1983 claim against the Offender Advocate and against the Board of Supervisors, and that these individuals would enjoy the same degree of immunity as Ms. Shepard. As to Polk County as an entity, the court indicated (*id.* at A19) that respondent should be given the opportunity on remand to amend his complaint so as to state his claim against the County with more specificity. The pendent state claims were also ordered reinstated (*id.* at A20).

**B. Statutory scheme**

Chapter 336A of the Iowa Code (West 1977 & Cum. Supp. 1980) authorizes the board of supervisors of any county to establish, by resolution, the office of public defender (Iowa Code Ann. §§ 336A.1).[6] The establishment and operation of the office are financed by appropriations from the county's court fund, al-

[6] The district court, in a footnote (Pet. App. B5 n.2) without further explanation, took judicial notice that the particular public defender's office involved here, the Polk County Offender Advocate, "does not exist under the authority of Iowa Code Chapter 336A," but rather "is the independent creation of the Polk County Board of Supervisors." We find nothing in the record to support that determination. Moreover, Iowa's statutory scheme, which was in existence at the time the Offender Advocate was established, does not appear to allow for the independent creation of a public defender's office that is not subject to Chapter 336A. Rather, any county choosing to establish a public defender's office apparently must comply with that chapter. We note that petitioners refer to that chapter as authorizing the office here. See Pet. Br. 3-5.

though the county may also accept contributions from private organizations and individuals and other public agencies (§ 336A.2).[7]

The public defender is appointed by the county's board of supervisors, which chooses between two candidates nominated and certified by the district court judges of the judicial district in which the county is located (§ 336A.3). The public defender may appoint such assistant attorneys and support personnel as the board considers necessary, in the manner prescribed by the board (§ 336A.5(2)). The compensation of those appointees and of the public defender is fixed by the board (§§ 336A.5(1) and 336A.5(3) (West Cum. Supp. 1980)). The board provides office space, furniture, equipment, and supplies, or an allowance in lieu of such facilities, to the public defender (§ 336A.9; see Pet. Br. 4). The board also establishes the criteria by which the public defender (before the initial court appearance) or the court (at or after the initial court appearance) determines whether a criminal defendant is an indigent entitled to representation by the public defender (§ 336A.4).

The board may require that public defenders and their assistants devote full-time to their positions and not engage in the private practice of law (§ 336A.10 (West Cum. Supp. 1980)).[8] Moreover, public defenders and their assistants are prohibited from recommending a particular attorney, or from referring any litigation or other legal matter to a particular attorney, if the county is or is likely to be

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[7] The Polk County Offender Advocate, however, is fully funded by the county (see Pet. App. B5 n.2).

[8] The Polk County Offender Advocate employs only full-time public defenders (see Pet. App. B5 n.2).

a party to or have a substantial interest in the matter (§ 336A.11 (West Cum. Supp. 1980)).

The public defender is required to prepare an annual report of all of the cases handled during the preceding year (§ 336A.8). The report must be submitted to the judges of the county's district court, to the attorney general, and to the county's board of supervisors (*ibid.*).

## SUMMARY OF ARGUMENT

1. As a full-time public defender in the office of the Polk County Offender Advocate, petitioner Shepard is hired and compensated by the County under a state statutory scheme that makes it her duty to represent indigent criminal defendants in the Iowa courts at trial and on appeal. Respondent has alleged that he was deprived of constitutional rights through her representation of him in the appeal of his conviction. Because, in performing this task in her role as public defender, petitioner Shepard was acting within the scope of her government employment, exercising powers and responsibilities that she had by virtue of her position, and performing an essential governmental function—enabling the State to fulfill its constitutional duty to provide counsel for indigent criminal defendants—she was acting "under color of * * * law" as that phrase has been defined in *United States* v. *Classic*, 313 U.S. 299 (1941), and its progeny, construing 42 U.S.C. 1983 or its criminal law counterparts.

There is no merit to petitioners' contention that public defenders should not be held to act under color of law with respect to representation of indigent defendants unless court-appointed private attorneys are considered similarly liable under Section

1983 for such representation. The similarities in their duties to the defendants are outweighed, for purposes of Section 1983 liability, by the fact that, unlike private attorneys, public defenders are government employees performing these duties as part of their regular government employment. In any event, because Section 1983 reaches only state action, it is inevitable that some private actors may escape liability for actions that, if taken by a state employee, would come within the statute. *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), on which petitioners heavily rely, has no bearing on the "color of law" issue, since that case concerned only the question whether there was any federal requirement that private attorneys appointed to represent criminal defendants in federal trials be granted immunity from liability in state malpractice actions.

2. While we submit that the court of appeals' holding on the "color of law" issue should be affirmed on the authority of *United States* v. *Classic*, *supra*, we believe that the same result may be reached under the analysis of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). *Burton* generally stands for the proposition that the conduct of even a private actor may constitute state action if a symbiotic relationship between the actor and the State is shown. That relationship is clearly present here where the state statute establishes the office, provides for its support by public funds, and defines the duties of its public defender employees. The State, in part through its creature, the County, has thereby "elected to place its power, property, and prestige" (*id.* at 725) behind the official activities of the office of the Offender Advocate. Moreover, because the complaint alleges that petitioner Shepard violated respondent's constitutional rights in a manner that was in accord-

ance with rules and practices of her office, it satisfies an even stricter test than *Burton* by alleging direct involvement by the governmental agency in the particular acts at issue.

## ARGUMENT

### A COUNTY-EMPLOYED PUBLIC DEFENDER ACTS UNDER COLOR OF STATE LAW, WITHIN THE MEANING OF 42 U.S.C. 1983, IN REPRESENTING INDIGENT CRIMINAL DEFENDANTS

Only persons who act "under color of * * * law" may be liable under 42 U.S.C. 1983. This Court has construed that phrase on a number of occasions in cases involving Section 1983 or its criminal law counterpart, 18 U.S.C. 242 (and its predecessor). *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Monroe* v. *Pape*, 365 U.S. 167, 183-187 (1961); *Williams* v. *United States*, 341 U.S. 97, 99 (1951); *Screws* v. *United States*, 325 U.S. 91, 109-113 (1945); *United States* v. *Classic*, 313 U.S. 299 (1941). Moreover, because "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment" (*United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966)), the issue in this case is also illuminated by the analysis in cases such as *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), which concerned the question whether certain racially discriminatory conduct was "state action" in violation of rights under the Fourteenth Amendment. Under the principles of all of these cases, we submit, petitioner Shepard acted "un-

der color of [state] law" in her representation of respondent.[9]

1. In *United States* v. *Classic*, *supra*, this Court reviewed the criminal convictions of certain Commissioners of Elections, who had been found guilty of violating 18 U.S.C. (1940 ed.) 52, the predecessor of 18 U.S.C. 242, by willfully altering and making a false count and certification of ballots cast by voters in a Democratic primary election. In explaining how the "color of law" element of the offense had been established, the Court stated (313 U.S. at 325-326 (citations omitted)):

> The alleged acts of appellees [the Commissioners] were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

This construction of the term was later reaffirmed in *Screws* v. *United States*, *supra*, 325 U.S. at 109-113, and *Monroe* v. *Pape*, *supra*, 365 U.S. at 184, cases concerned with unlawful behavior by police officers who, as the Court noted in each case (325 U.S. at 110; 365 U.S. at 184), committed the acts in question in the course of performing their official

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[9] We refer only to petitioner Shepard because, if the complaint's allegations concerning her may be taken as describing acts "under color of [state] law," the same conclusion would follow *a fortiori* with respect to her superior, the Offender Advocate. We note that petitioners' brief appears to focus almost exclusively on persons in the position of petitioner Shepard.

duties, although their conduct amounted to a gross misuse of their lawful authority.

That formulation of the "color of law" test controls the present case. Petitioner Shepard possesses her power as to each defendant by virtue of the appointments she receives in her capacity as an attorney-employee in the office of the Polk County Advocate. Her principal duties are defined in the state code. She is to represent each indigent defendant assigned to her "at every stage of the proceedings against him" and to "prosecute any appeals or other remedies before or after conviction that [s]he considers to be in the interest of justice" (Iowa Code Ann. § 336A.6 (West 1977)). Respondent has alleged that in the course of her exercise of that state-conferred authority in representing him, he was deprived of various constitutional rights, and he has therefore adequately alleged action under color of state law within the meaning of 42 U.S.C. 1983.

This case presents none of the typical problems in cases brought under 42 U.S.C. 1983 or its criminal law counterparts in distinguishing between private action and action under color of law. There is no suggestion that the acts allegedly depriving respondent of constitutional rights were purely "personal" acts outside the scope of petitioner Shepard's employment. Compare, *e.g.*, *Stengel* v. *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed as improvidently granted, 429 U.S. 118 (1976), with *Johnson* v. *Hackett*, 284 F.Supp. 933, 937 (E.D. Pa. 1968). Nor is this a case involving a private individual in which liability under Section 1983 turns on a finding of action in concert with a state officer or employee. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 152. Petitioner Shepard is herself the state employee, *i.e.*, an employee of the

County, which, as the court of appeals noted (Pet. App. A6), is, "of course, merely a creature of the State."

The fact that petitioner Shepard's duties as a lawyer for indigents resemble those performed by private attorneys appointed to represent indigents and that in both instances the lawyer has a duty of loyalty to the client does not, as petitioners contend (Pet. Br. 31-40), dictate a different result. It is true that the courts have uniformly held that court-appointed private attorneys do not act "under color of state law" in their representation of indigents at government expense.[10] The mere similarity of functions between the duties of those court-appointed attorneys and the duties of public defenders, however, does not require equivalent treatment under Section 1983. Only state action, not private conduct, is encompassed by Section 1983, which, like the Fourteenth Amendment, "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948), citing *Civil Rights Cases*, 109 U.S. 3, 11 (1883). Accordingly, Section 1983 proscribes certain conduct by state actors even though identical conduct by private actors is not reached by the statute. There is thus no inconsistency in holding public defenders liable under Section 1983 because they are state

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[10] See, *e.g.*, *Page* v. *Sharpe*, 487 F.2d 567, 570 (1st Cir. 1973); *Hall* v. *Quillen*, 631 F.2d 1154, 1156 (4th Cir. 1980); *Mulligan* v. *Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968); *French* v. *Corrigan*, 432 F.2d 1211, 1214 (7th Cir. 1970), cert. denied, 401 U.S. 915 (1971); *Barnes* v. *Dorsey*, 480 F.2d 1057, 1061 (8th Cir. 1973). We take no position on the correctness of these decisions since the Court need not, in the present case, decide the status, for Section 1983 purposes, of attorneys in such circumstances.

employees even if private attorneys are not similarly liable.[11]

Indeed, the differences in legal circumstances between the two categories of attorneys are quite marked. Private attorneys who receive court appointments to represent indigents, either as an exception to their normal routine of private representation of clients or as a large proportion of their practice, are not assured of a continuous flow of such assignments. In undertaking such assignments, they function as private practitioners retained by the State to represent particular clients. Their relationship to the State is that of professional independent contractors, rather than employees. Full-time public defenders, who are compensated on a continuing, salaried basis by a state or local agency pursuant to state statute, who are regularly assigned by the court to represent indigent criminal defendants by virtue of their employment, and whose sole function as public defenders is to undertake such representation, are, by contrast, public employees. The difference between their employment relationship with the State and the State's relationship with retained, appointed counsel results in many differences in legal consequences, such as tax treatment of their compensation, appli-

[11] Petitioners' reliance (Pet. Br. 54-64) on *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), is unpersuasive. To be sure, in *Ferri* the Court analogized the duties of court-appointed private attorneys who receive federal compensation for representing indigents to the duties of privately retained attorneys. But even assuming that the duties of full-time public defenders are like those of court-appointed private attorneys, *Ferri* has no bearing on the "color of law" issue here. *Ferri* was a state malpractice action and the question decided by the Court was whether such court-appointed attorneys enjoyed the absolute immunity to suit shared by judges and prosecutors.

cation of principles of *respondeat superior*, application of anti-discrimination laws, etc. And see *Branti* v. *Finkel*, 445 U.S. 507 (1980). And, as the court of appeals recognized (Pet. App. A6), public defenders have the power and the responsibility to represent particular defendants specifically because of their positions as public employees. Moreover, the public defender appears to his indigent client as an individual clothed with the authority of the State: the indigent client has had no voice in the selection of the attorney, and the public defender assigned to represent him is in a very real sense the choice of the public officer responsible for hiring the staff of the public defender's office as well as the judge who makes the appointment. See *Liability of Public Defenders Under Section 1983: Robinson* v. *Bergstrom*, 92 Harv. L. Rev. 943, 946-947 (1979).[12]

To be sure, as petitioners (Pet. Br. 13-15, 32-33) and the dissenting judge below (Pet. App. A25) point out, a public defender—like any other attorney—has a strict professional duty of loyalty to the interests of his client. They apparently reason from this that, at least at the point the defender takes on the representation of a client, his state power must be deemed to disappear. But most licensed professional employees have a duty to the ethics of their profession and those whom they serve, and this fact is not thought to strip their conduct of the character of

[12] An indigent defendant may request that an attorney other than the public defender be appointed to represent him, but such a motion will be granted only "for cause." Iowa Code Ann. § 336A.7 (West 1977). Cf. *Robinson* v. *Jordan*, 494 F.2d 793, 795 (5th Cir. 1974), in which the court held that a county health officer acted "under color of [state] law" in treating a county jail detainee, who was prevented by his detention from seeking a physician of his choice.

state action for the purposes of Section 1983 liability. Physicians, for example, have a duty to act in the best interests of their patients, but this has not been raised as an objection to subjecting physicians employed by public institutions to liability in Section 1983 suits relating to their treatment of patients in such institutions. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (prison medical director who also personally treated the prisoner-plaintiff); *Rogers* v. *Okin*, 634 F.2d 650 (1st Cir. 1980) (state health officials and hospital physicians charged with violating the rights of mental patients by requiring the patients to submit to certain types of medications), cert. granted on questions unrelated to status of physician-defendants, No. 80-1417 (Apr. 20, 1981). In the case of both public employee physicians and public employee defense attorneys, however, the fact remains that it is the government that hires, compensates, and fires them, and sets the conditions under which they perform their duties to patients and clients. Moreover, in each case the very performance of the duty to the patient or client may also serve an essential governmental function. In the case of public defenders, it is the State's fulfillment of its obligation to make legal assistance available to indigents at trial and on first appeal. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963).

If the nature of public defenders' duties in representing indigent clients makes it undesirable to subject them to liability for actions taken in the course of performance of those duties, the point may properly be raised in connection with the question of their immunity from such suits. It has no bearing, however, on the question whether they act under color

of law while performing the tasks for which they were hired.

Finally, both petitioners (Pet. Br. 46-54) and the dissenting judge below (Pet. App. A21-A22) rely on what they perceive as the weight of appellate authority. In fact, however, only four courts of appeals have ruled on the question at issue in this case and only two have supported petitioners' position. The Eighth Circuit in the present case (Pet. App. A) has joined the Seventh Circuit in *Robinson* v. *Bergstrom*, 579 F.2d 401, 405-408 (1978), in holding that public defenders *do* act under color of state law in their representation of indigent defendants.[13] See also *United States* v. *Senak*, 477 F.2d 304, 307-308 (7th Cir.), cert. denied, 414 U.S. 856 (1973) (reversing dismissal of indictment under criminal counterpart of Section 1983); *United States* v. *Senak*, 527 F.2d 129, 149-150 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976) (reaffirming prior decision following conviction). The Fifth and Tenth Circuits, on the other hand, have held that they do not. *Slavin* v. *Curry*, 574 F.2d 1256, 1265 (5th Cir.), modified on other grounds, 583 F.2d 779 (5th Cir. 1978); *Skipper* v. *Brummer*, 598 F.2d 427, 428 (5th Cir. 1979), vacated and remanded on other grounds,

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[13] We note that *Robinson* v. *Bergstrom*, *supra*, involved a county-employed public defender who worked only part-time at that job; while he was compensated by the county for his work as public defender, he maintained a private practice on the side. 579 F.2d at 402. We perceive no meaningful distinction between that case and this; in any event, the reasoning of *Robinson* is, if anything, even more compelling as to full-time public defenders.

444 U.S. 1063 (1980);[14] *Espinoza* v. *Rogers*, 470 F.2d 1174, 1175 (10th Cir. 1972).[15]

In this Court, however, those decisions are significant only for the strength of their reasoning, and the Seventh Circuit's opinion in *Robinson* v. *Bergstrom*, on which the court of appeals in this case strongly relied, represents the only thorough consideration of the question—one that rests on a careful reading of this Court's decisions. The Fifth Circuit decisions simply stated without explanation that no state action was involved, citing cases concerning court-appointed private attorneys rather than public defenders.[16] The Tenth Circuit briefly articulated two grounds for its conclusion to the same effect, but did not explore competing considerations; and all of its supporting citations, with the exception of one district court opinion,[17] again involved court-appointed

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[14] But *cf. Robinson* v. *Jordan*, *supra*, 494 F.2d at 795.

[15] In addition, the Third and Ninth Circuits, while not deciding the question, have supported in dicta the latter position. *Brown* v. *Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973); *Miller* v. *Barilla*, 549 F.2d 648, 650 (9th Cir. 1977). Instead of deciding the state action question, these circuits ruled that public defenders are entitled to absolute immunity from liability under Section 1983. *Brown* v. *Joseph*, *supra*, 463 F.2d at 1048-1049; *Miller* v. *Barilla*, *supra*, 549 F.2d at 649.

[16] See *United States ex rel. Simmons* v. *Zibilich*, 542 F.2d 259, 261 (5th Cir. 1976) (private attorney volunteering services through local "indigent defender" board); *Sullens* v. *Carroll*, 446 F.2d 1392 (5th Cir. 1971) (malpractice suit against court-appointed attorney in federal criminal case decided on immunity grounds).

[17] See *United States ex rel. Wood* v. *Blacker*, 335 F.Supp. 43 (D.N.J. 1971).

private attorneys.[18] Neither court supplied any reason for equating public defenders with court-appointed private attorneys.

Whatever the correct rule respecting private attorneys who represent indigents under court appointment, however, the court below correctly applied the straightforward analysis of this Court's decisions (see pages 9-11, *supra*) in holding that county-employed public defenders act under color of law in performing their duty as public employees to represent indigent defendants in criminal proceedings.

2. As we have argued above, the holding of the court of appeals on the color of law issue should be affirmed on the authority of *United States* v. *Classic*, *supra*, a case petitioners do not cite in their brief. That holding may also be affirmed, however, by application of principles stated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), a case cited by petitioners (Pet. Br. 42-43) as distinguishable on the ground that it involved "extensive participation" by the State in the operation of the parking facility that housed the enterprise responsible for the racially discriminatory actions at issue in the case.

In fact, the parking authority in *Burton* was the sole operator of the parking facility; it was through its lease of commercial space in the facility to a restaurant that discriminated against blacks that the state action question arose. This Court concluded that the restaurant's refusal to serve black patrons was state action under the Fourteenth Amendment notwithstanding that the restaurant was a private

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[18] See *Thomas* v. *Howard*, 455 F.2d 228 (3d Cir. 1972) (dicta in suit barred by statute of limitations); *Peake* v. *County of Philadelphia*, 280 F.Supp. 853 (E.D. Pa. 1968).

business. It based its holding on its findings (365 U.S. at 723-725) (1) that the commercially leased areas, including the restaurant, "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its [parking] project as a self-sustaining unit," (2) that the benefits of the arrangement were reciprocal (the restaurant's profits contributed to "the financial success" of the parking authority and the restaurant benefited from the convenient parking facility for its patrons), and (3) that the State had the ability to require the restaurant, through the terms of the lease, to serve patrons without regard to race. The Court concluded (*id.* at 725) that through "its inaction, the Authority, and through it the State, [had] not only made itself a party to the refusal of service, but [had] elected to place its power, property, and prestige behind the admitted discrimination" and that the State had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity * * *."

*Burton*, then, stands for the proposition that the conduct of a private actor may constitute state action if a "symbiotic relationship" between the actor and the State is shown. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357-358 (1974), explaining *Burton*. State action is therefore demonstrable *a fortiori* where the conduct is that of one of the State's employees engaged in the duties for which the State pays the compensation. Here, the State of Iowa, by establishing the statutory basis for the office of the Offender Advocate, by providing for its financing in whole or in part out of public funds, by providing (through the County) its office space, furniture, and equipment, and by benefiting, in re-

turn, from the performance, by the defenders, of a public service that the State is obligated to provide as part of its criminal justice system, has "elected to place its power, property, and prestige" (*Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. at 725) behind the official conduct of the attorneys employed in the Office of the Offender Advocate engaged in representing indigent criminal defendants. Even though petitioner Shepard's representation of respondent is in some respects analogous to the work of a private attorney, then, the state action, or color of law, element is unmistakably present. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656, 672-677 (1974) (state action through government funding).[19]

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[19] We note also that in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that, for purposes of testing the constitutionality of a state criminal conviction in a federal habeas corpus proceeding, ineffective assistance of counsel by a defendant's retained *private* attorney may constitute state action. The Court noted (*id.* at 343; citations omitted) that "a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment." Thus, regardless of the fact that fundamental unfairness in a trial may be the result of the conduct of private counsel, "[w]hen a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty" (*ibid.*; citation omitted). We do not suggest that *Sullivan* controls the present case, since the purpose of the "state action" inquiry here is different; but *Sullivan* does show that it is an oversimplification to suggest that the State has no connection with the public defender's representation of indigents unless it can be shown that the defender has less autonomy than private counsel in representing indigent defendants.

Petitioners argue (Pet. Br. 36) that a Section 1983 complaint against a public defender fails unless it alleges not only that the State (or its creature, the County) hires and compensates the defender but that it also directly involves itself otherwise in the actions alleged as deprivations of constitutional rights. We disagree for two reasons. First, as we have shown, this is not a requirement under *United States* v. *Classic*, *supra*, and its progeny, since the conduct of a state employee may be state action even when it is in defiance of state law. See *Monroe* v. *Pape*, *supra*, 365 U.S. at 172, 187. Second, petitioners' contention is another way of stating an argument correctly rejected by the Seventh Circuit in *Robinson* v. *Bergstrom*, *supra*, in reliance on a line of decisions in the Third Circuit.[20] As the *Robinson* v. *Bergstrom* court concluded in reviewing those cases, when the actor whose conduct is at issue is a state instrumentality or the agent or employee of such an instrumentality, there is no need, under *Burton*, to establish a particular nexus between the challenged conduct and state policy. Such a nexus showing is required only where, as in *Jackson* v. *Metropolitan Edison Co.*, *supra*, the one whose actions are in question is a private person or enterprise, albeit one heavily regulated by the State. *Robinson* v. *Bergstrom*, *supra*, 579 F.2d at 406-407.

In any event, even were the *Jackson* nexus requirement applicable in the present case, it would be satisfied. First, as one commentator has noted (*Liability of Public Defenders under Section 1983:*

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[20] *Chalfant* v. *Wilmington Institute*, 574 F.2d 739 (3d Cir. 1978) (en banc); *Braden* v. *University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc); *Hollenbaugh* v. *Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976).

*Robinson* v. *Bergstrom*, 92 Harv. L. Rev. 943, 947 (1979) (footnote omitted)):

> [S]tate [or county] control over the number of attorneys and support personnel in the public defender's office will affect the public defender's caseload and thus circumscribe his discretion regarding the amount of time to devote to each case. As a consequence, the state effectively influences decisions made by public defenders in a way that it cannot influence those made by private attorneys.

Second, the requirement of an annual report to State and County officials by the public defender's office, combined with the County's power to fire and replace the public defender who heads the office, makes the public defenders responsible to the State for their performance in the representation of their clients, and allows the State to exercise some degree of supervisory review over that performance. Finally, respondent's complaint, given the liberal reading accorded pro se complaints (see *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)), appears to allege (A. 5-6, 8, 20-21) that petitioner Shepard's handling of his appeal was in keeping with the regular practices of the office of the Offender Advocate, which in turn was governed by "grounds rules" [sic] established by Polk County. In short, respondent alleges, that petitioner Shepard treated his appeal in a manner that deprived him of rights under the Sixth, Eighth, and Fourteenth Amendments and that she did so in accordance with the policies of her office and of the County. This is an allegation of state action under the very strictest test.

Indeed, these allegations appear sufficient to satisfy the narrow interpretation of the statutory phrase "under color of * * * law" espoused in the dissenting opinions in *Screws* (325 U.S. at 138) and *Monroe* v. *Pape* (365 U.S. at 202; see also *id.* at 192 (concurring opinion)), which this Court rejected as unduly restrictive. It follows *a fortiori* that the complaint alleges acts performed under color of state law within the meaning of 42 U.S.C. 1983. And, for the reasons previously discussed, the same conclusion would be required by this Court's decisions in the absence of those allegations. Cf. *United States* v. *Senak, supra.*

## CONCLUSION

The judgment of the court of appeals on the color of law question should be affirmed.

Respectfully submitted.

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